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1087

No. 2955

1087

UNITED STATES
CIRCUIT COURT OF APPEALS,
FOR THE NINTH CIRCUIT

LOUIE DING and LOUIE LUNG GIN,
Plaintiffs in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error.

TRANSCRIPT OF RECORD

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION

Filed

Press of Pliny L. Allen Co., Seattle

MAR 10 1917

F. D. Monckton,
Clerk.

No. _____

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*In the District Court of the United States for the
Western District of Washington. Northern
Division.*

No. 3282

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JAMES F. WORTHINGTON, et al.,
Defendants.

NAMES AND ADDRESSES OF COUNSEL

WILLIAM R. BELL, Esq., Attorney for Defendants and Plaintiffs in Error,
422 New York Building, Seattle, Wash.

WALTER S. FULTON, Esq., Attorney for Defendants and Plaintiffs in Error,
1112 Hoge Building, Seattle, Wash.

CLAY ALLEN, Esq., Attorney for Plaintiff and Defendant in Error,
Room 310 Federal Building, Seattle, Wash.

WINTER S. MARTIN, Esq., Attorney for Plaintiff and Defendant in Error,
Room 310 Federal Building, Seattle, Wash.

*United States District Court, Western District of
Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES F. WORTHINGTON, MELVIN B. MIL-
LER, LOUIE E. LORTIE, LOUIE DING,
ENG DAN, alias NG DAN, alias CHINA
DAN, LOUIE LUNG GIN, ATSHUSHI ITO,
JUE LEE, SAM YUEN, FONG WEE, WONG
DING, NG WAH, LOCK WAH and WONG
WING,

Defendants.

No. 3282

INDICTMENT

*The United States of America, Western District
of Washington, Northern Division, ss.*

The grand jurors of the United States of
America, duly selected, impaneled, sworn and
charged to inquire within and for the Northern Di-
vision of the Western District of Washington, upon
their oaths present:

COUNT I.

That James F. Worthington, Melvin B. Mil-
ler, Louis E. Lortie, Louie Ding, Eng Dan, alias Ng
Dan, alias China Dan, Louie Lung Gin, Atshushi
Ito, Jue Lee, Sam Yuen, Fong Wee, Wong Ding,
Ng Wah, Lock Wah and Wong Wing on the tenth

day of December, A. D. one thousand nine hundred and fifteen, at Seattle, in the Northern Division of the Western District of Washington and within the jurisdiction of this court, did wilfully, knowingly, unlawfully, feloniously, wickedly and maliciously conspire, combine, confederate and agree together, and together and with divers other persons to these grand jurors unknown, to commit certain offenses against the United States, all as a part of said conspiracy mentioned, to-wit, to violate Section 11 of the Act of Congress of May 6, 1882, as amended and added to by the Act of July 5, 1884, in this: That it was the purpose and object of the said conspiracy and of the said conspirators, and each of them, to wilfully, knowingly, unlawfully, feloniously and maliciously bring into and cause to be brought into the division and district aforesaid, and aid and abet the landing of, by vessel, at Seattle in said division and district aforesaid, in the United States, from Vancouver, in the province of British Columbia, in the Dominion of Canada, certain Chinese alien persons not lawfully entitled to enter the United States, and not lawfully entitled to be or remain in the United States; which said Chinese persons were and are named as follows, to-wit: Jue Lee, Sam Yuen, Fong Wee, Wong Ding, Ng Wah, Lock Wah, Wong Wing, Lee Gin and Wong Yow, alias Wong You; and to violate Section 8 of the Act of Congress of February 20, 1907, as amended, in this:

That it was the purpose and object of the said conspiracy and of the said conspirators, and each of them, to wilfully, knowingly, unlawfully, feloniously and maliciously bring into and land in the United States, at Seattle, aforesaid, by vessel, certain alien persons, who had not theretofore been duly admitted by an immigrant inspector of the United States, and who were not lawfully entitled to enter the United States or be or remain in the United States at all; which said mentioned alien Chinese persons were and are named as follows, to-wit, Jue Lee, Sam Yuen, Fong Wee, Wong Ding, Ng Wah, Lock Wah, Wong Wing, Lee Gin and Wong Yow, alias Wong You.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Louis E. Lortie, at Seattle in the northern division of the western district of Washington and within the jurisdiction of this court, on the tenth day of December, A. D. one thousand nine hundred and fifteen, did wilfully, knowingly, unlawfully and feloniously receive and take from said Louie Ding a letter written in Chinese, the contents of the said letter and name of the addressee thereof being to the grand jurors unknown.

And the grand jurors aforesaid, upon their oaths, do further present: That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Louis E. Lortie, at Seattle, in the Northern Division of the Western District of Washington and within the jurisdiction of this court, on the tenth day of December, A. D. one thousand nine hundred and fifteen, did wilfully, knowingly, unlawfully and feloniously deliver and give to said James F. Worthington a letter written in Chinese, the contents of the said letter and name of the addressee thereof being to these grand jurors unknown.

And the grand jurors aforesaid, upon their oaths do further present: That after the formation of said unlawful conspiracy, the said Louie E. Lortie and the said James F. Worthington and the said Melvin B. Miller on the eleventh day of December, A. D. one thousand nine hundred and fifteen, did wilfully, knowingly, unlawfully and feloniously go on board a launch, to wit, the "Blanch W", at the city of Seattle, in the Northern Division of the Western District of Washington and within the jurisdiction of this court, and in the waters of Puget Sound, a more particular description of said place being to these grand jurors unknown, and immediately thereafter operate and navigate the said launch, "Blanch W," from said Seattle to the city of Vancouver, in the province of British Columbia

in the Dominion of Canada; a more particular description of said journey being to these grand jurors unknown.

And the grand jurors aforesaid, upon their oaths do further present: That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Melvin B. Miller and the said James F. Worthington, on the fourteenth day of December, A. D. one thousand nine hundred and fifteen, together with said Jue Lee, Sam Yuen, Fong Wee, Wong Ding, Ng Wah, Lock Wah and Wong Wing, at Vancouver, in the province of British Columbia in the Dominion of Canada, did wilfully, knowingly, unlawfully and feloniously embark upon a certain launch called and named "Blanch W" and immediately thereafter sailed and traveled on said launch from the said city of Vancouver to the city of Seattle, in the Northern Division of the Western District of Washington.

And the grand jurors aforesaid, upon their oaths do further present: That after the formation of said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said Melvin B. Miller and the said James F. Worthington, together with said Jue Lee, Sam Yuen, Fong Wee, Wong Ding, Ng Wah, Lock Wah and Wong Wing, on the fourteenth day of December, A. D. one thousand nine hundred and

fifteen, at Vancouver, in the province of British Columbia in the Dominion of Canada, did wilfully, knowingly, unlawfully and feloniously embark upon a motor boat or launch named "Blanch W", and then and there and immediately thereafter bring, and cause to be brought, two certain mentioned Chinese alien persons, to wit, Lee Gin and Wong Yow, alias Wong You, who were then and there Chinese laborers, from said city of Vancouver, to the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, on board said launch; all for the purpose of landing the said Lee Gin and the said Wong Yow, alias Wong You, in the said city of Seattle.

And the grand jurors aforesaid, upon their oaths do further present: That after the formation of the said unlawful conspiracy and in pursuance of and to effect the object of said unlawful conspiracy, the said James F. Worthington and the said Melvin B. Miller, on the fourteenth day of December, A. D. one thousand nine hundred and fifteen, at Vancouver, British Columbia, in the Dominion of Canada, did wilfully, knowingly, unlawfully and feloniously go on board a launch or motor boat, named "Blanch W," and immediately thereafter commence to operate, control, attend to and navigate the said motor boat, and immediately thereafter did operate and navigate the said boat

from said Vancouver to said Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

CLAY ALLEN,

United States Attorney.

WINTER S. MARTIN,

Assistant United States Attorney.

Indorsed: The United States vs. James F. Worthington, et al. Indictment for Violation Sec. 37 Penal Code to violate Sec. 11, Act May 6, 1882, as amended, and Sec. 8, Act Feb. 20, 1907, as amended. A True Bill. John D. Wenger, Foreman Grand Jury. Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and filed in the U. S. District Court, March 23, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*United States of America, Western District of
Washington, Northern Division, ss.*

No. 3282

BENCH WARRANT

(Indictment)

The President of the United States—

To the Marshal of the United States of America, for the Western District of Washington, his Deputies, or any or either of them, Greeting:

Whereas, at a District Court of the United States of America, for the Western District of Washington, begun and held at the city of Seattle, within and for the District aforesaid, on the 23rd day of March, in the year of our Lord one thousand nine hundred and sixteen the Grand Jurors, in and for said District, returned into the said District Court a True Bill of Indictment against Louie Ding for violation Sec. 37, Penal Code, to violate Sec. 11, Act May 6, 1882, as amended, and Sec. 8, Act Feb. 20, 1907, as amended, as by the said Bill of Indictment, now remaining on file and of record in said Court, will more fully appear; to which Bill of Indictment the said Louie Ding has not yet appeared or pleaded:

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Louie Ding and him

bring before the said Court, at the United States District Court Room, in the City of Seattle to answer the Bill of Indictment aforesaid.

Witness: The Honorable Jeremiah Neterer, Judge of the said District Court, and the Seal thereof, at the City of Seattle, this 23rd day of March, A. D. 1916.

(Seal)

FRANK L. CROSBY,
Clerk.

CLAY ALLEN, Esq.,

United States District Attorney.

MARSHAL'S RETURN

United States of America, Western District of Washington.

In obedience to the within Warrant, I have the body of the said Louie Ding before the Honorable, the District Court of the United States, in and for the Western District of Washington, this 25th day of March, A. D. 1916.

JOHN M. BOYLE,
U. S. Marshal,

By A. ROOKS,
Deputy U. S. Marshal.

Marshal's Fees, \$3.02.

Indorsed: Bench Warrant. (Indictment) Bail fixed at \$3,000.00. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 27, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.

*United States of America, Western District of
Washington, Northern Division, ss.*

No. 3282

BENCH WARRANT

(Indictment)

The President of the United States—

To the Marshal of the United States of America, for the Western District of Washington, his Deputies, or any or either of them, Greeting:

Whereas, at a District Court of the United States of America, for the Western District of Washington, begun and held at the City of Seattle, within and for the District aforesaid, on the 23rd day of March, in the year of our Lord one thousand nine hundred and sixteen the Grand Jurors, in and for said District, returned into the said District Court a True Bill of Indictment against Louie Lung Gin for violation Sec. 37, Penal Code, to violate Sec. 11, Act May 6, 1882, as amended, and Sec. 8, Act Feb. 20, 1907, as amended, as by the said Bill of Indictment, now remaining on file and of record in said Court, will more fully appear, to which Bill of Indictment the said Louie Lung Gin has not yet appeared or pleaded:

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Louie Lung Gin and him bring before the said Court, at the United

States District Court Room, in the City of Seattle to answer the Bill of Indictment aforesaid.

Witness: The Honorable Jeremiah Neterer, Judge of the said District Court, and the Seal thereof, at the City of Seattle, this 24th day of May, A. D. 1916.

(Seal) FRANK L. CROSBY,
Clerk.
By ED M. LAKIN,
Deputy Clerk.

CLAY ALLEN, Esq.,
United States District Attorney.

MARSHAL'S RETURN

United States of America, Western District of Washington—

In obedience to the within Warrant, I have the body of the said Louie Lung Gin before the Honorable, the District Court of the United States, in and for the Western District of Washington, this 24th day of May, A. D. 1916.

JOHN M. BOYLE,
U. S. Marshal.

By A. ROOKS,
Deputy U. S. Marshal.

Marshal's Fees \$2.12.

Indorsed: Bench Warrant. (Indictment). Bail fixed at \$2,500.00. Attest Frank L. Crosby, Clerk. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, May 25, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

No. 3282

ARRAIGNMENT AND PLEA—LOUIE DING

Now on this day into open Court comes the said defendant Louie Ding for arraignment, accompanied by his counsel Thos. B. MacMahon, and being asked if the name by which he is indicted is his true name, replies "My true name is Louie Tong Ding." Whereupon the reading of the indictment is waived and he here and now enters his plea of not guilty to the charge in the indictment herein against him.

Dated March 30, 1916.

Journal 5, Page 294.

No. 3282

ARRAIGNMENT AND PLEA—LOUIE LUNG GIN

Now on this day into open Court comes the said defendant Louie Lung Gin for arraignment, accompanied by his counsel Thos. B. MacMahon, and being asked if the name by which he is indicted is his true name, replies "It is." Whereupon the reading of the indictment is waived and he here and now enters his plea of not guilty to the charge in the indictment herein against him.

Dated May 24, 1916.

Journal 5, Page 351.

No. 3282

TRIAL

Now on this day this cause comes on for trial in open Court, the plaintiff being represented by Winter S. Martin, Asst. Dist. Atty., for the Government, and Thos. B. MacMahon appearing for defendants on trial as follows: Louie Ding, Louie Lung Gin, Jue Lee, Sam Yuen, Fong Wee, Wong Ding, Ng Wah, Lock Wah and Wong Wing. Both sides being ready for trial a jury is called and come and answer to their names as follows: A. R. Manca, C. E. Wilkins, Chas. H. Loux, John Storseth, J. W. Hughes, V. Elfendahl, J. C. Robinson, A. G. Newfang, Paul N. Myhre, A. P. Manion, R. J. Reichenbach, Thos. Alexander, twelve good and lawful men duly empaneled and sworn. On motion of defendants' counsel all witnesses except Thos. Fisher are excluded from the Court room during the trial. Opening statement is made by the Government and Louie Lortie examined. Plaintiff's exhibits are introduced as follows: Nos. 1, 2, 3, 4, 5 and 6. And now the hour of adjournment having arrived, by consent of parties it is ordered by the Court that this cause be and is hereby continued until ten o'clock tomorrow morning, and the Court having cautioned the jury in this case they are allowed to separate until that hour.

Dated June 1, 1916.

Journal 5, Page 361.

No. 3282

VERDICT

We, the jury in the above entitled cause, find Defendant Louie Ding is guilty. Defendant Louie Lung Gin is guilty. Defendant Jue Lee is guilty. Defendant Sam Yuen is guilty. Defendant Fong Wee is guilty. Defendant Wong Ding is guilty. Defendant Ng Wah is guilty. Defendant Lock Wah is guilty. Defendant Wong Wing is guilty. We recommend the last seven defendants to the clemency of the Court.

J. C. ROBINSON,
Foreman.

Indorsed: Verdict. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 2, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

No. 3282

MOTION FOR NEW TRIAL

Come now defendants Ding and Gin and move the Court to set aside the verdict of the jury rendered herein on the 2d day of June, 1916, and grant a new trial for the reason and upon the following grounds:

1. That said verdict is against and contrary to law.

2. That said verdict is against and contrary to the evidence.

3. Insufficiency of the evidence to justify the verdict.

4. Errors of law occurring during the trial and excepted to at the time by the said defendants.

5. Erroneous instructions given to the jury by the trial judge and particularly that part of the instructions wherein the trial judge instructed the jury that they would be justified in finding said defendants guilty if the evidence established beyond a reasonable doubt that the offense charged in the indictment had been committed any time within 3 years prior to the finding of said indictment.

WM. R. BELL,

Defendants' Attorney.

Indorsed: Motion for new trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 12, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

No. 3282

HEARING ON MOTION FOR NEW TRIAL

Now at this time the defendants Louie Ding and Louie Lung Gin and counsel being in open Court, motion is made for new trial and in arrest of

judgment, and the Court after hearing argument of respective counsel denies said motion.

Dated June 12, 1916.

Journal 5, Page 374.

No. 3299 and No. 3282

BOND

KNOW ALL MEN BY THESE PRESENTS, That we, Louie Ding, as principal, and Casualty Company of America, a corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to transact business of Surety in the State of Washington, as surety, are held and firmly bound unto the United States of America, Plaintiff in the above entitled actions in the penal sum of Three thousand dollars (\$3,000.00), lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH, That whereas the above named defendant, Louie Ding, was on the 12th day of June, 1916, sentenced in the above entitled case No. 3282, to serve a term of two years in the United States penitentiary at McNeils Island in the State of Washington and in addition thereto to pay a fine of

five hundred dollars (\$500.00) and in the above entitled case No. 3299 was on the same date sentenced to serve a term of two years in the United States penitentiary at McNeil's Island in the State of Washington, to run concurrently with the sentence in the first mentioned case in addition to pay a fine of Five hundred dollars (\$500.00); and

WHEREAS, The said defendant has appealed from the sentence and judgment in each of said cases to the Circuit Court of Appeals of the United States for the Ninth Circuit; and

WHEREAS, The above entitled Court has fixed the defendant's bond, to stay execution of the judgment in both of the said cases, in the sum of Eight thousand dollars (\$8,000.00), of which there is now on file in said Court a bond in the sum of Five thousand dollars (\$5,000.00), bearing date the 12th day of June, A. D. 1916, with the aforesaid Casualty Company of America as surety thereon;

NOW THEREFORE, If the said defendant, Louie Ding, shall diligently prosecute his said appeals and shall obey and abide by and render himself amenable to all orders which said appellate court shall make, or order to be made, in the premises and shall render himself amenable and obey all process issued, or ordered to be issued, by said appellate court herein and shall perform any judgment made or entered herein by said appellate court, including the payment of any judgment on

appeal and shall not leave the jurisdiction of this court without leave being first had and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable and obey any and all orders issued by said District Court and shall pursuant to any order issued by said District Court surrender himself and will obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 19th day of June, A. D. 1916.

LOUIE DING,

CASUALTY COMPANY OF AMERICA,

By C. Summer Best, Resident
Manager and Attorney in fact.

(SEAL)

The foregoing bond is hereby approved this 19th day of June, 1916.

JEREMIAH NETERER,

United States District Judge.

Within bond approved this 23d day of June, 1916.

WINTER S. MARTIN,

Asst. U. S. Attorney.

Indorsed: Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 23, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

No. 3282 and No. 3299

BOND

KNOW ALL MEN BY THESE PRESENTS, That we, Louie Ding, as principal, and Casualty Company of America, a corporation, organized and existing under and by virtue of the laws of the State of New York, and authorized to transact business of Surety in the State of Washington, as Surety, are held and firmly bound unto the United States of America, Plaintiff in the above entitled action, in the penal sum of Five thousand dollars (\$5,000.00), lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the above named defendant, Louie Ding, was on the 12th day of June, 1916, sentenced in the above entitled case No. 3282 to serve a term of two years in the United States penitentiary at McNeils Island in the State of Washington and in addition thereto to pay a fine of Five hundred dollars (\$500.00) and in the above entitled case No.

3299 was on the same date sentenced to serve a term of two years in the United States penitentiary at McNeils Island in the State of Washington, to run concurrently with the sentence in the first mentioned case and in addition to pay a fine of Five hundred dollars (\$500.00) and;

WHEREAS, The said Defendant has appealed from the sentence and judgment in each of said cases to the Circuit Court of Appeals of the United States for the Ninth Circuit; and

WHEREAS, The above entitled Court has fixed the defendant's bond, to stay execution of the judgment in both of the said cases, in the sum of Eight thousand dollars (\$8,000.00), of which there is now three thousand dollars (\$3,000.00) in cash on deposit with the registrar of the court;

NOW THEREFORE, If the said defendant, Louie Ding, shall diligently prosecute his said appeals and shall obey and abide by and render himself amenable to all orders which said appellate court shall make, or order to be made, in the premises and shall render himself amenable and obey all process issued, or ordered to be issued, by said appellate court herein and shall perform any judgment made or entered herein by said appellate court, including the payment of any judgment on appeal and shall not leave the jurisdiction of this Court without leave being first had and shall obey and abide by and render himself amenable to any and

all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable and obey any and all orders issued herein by said District Court and shall pursuant to any order issued by said District Court surrender himself and will obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise, to remain in full force and effect.

Sealed with our seals and dated this 12th day of June, A. D. 1916.

LOUIE DING,

By W. R. Bell, his Attorney in Fact.

CASUALTY COMPANY OF AMERICA,

By C. Summer Best, Resident Manager and Attorney in Fact.

(SEAL)

The foregoing bond is hereby approved this 12th day of June, 1916, and the Marshal of this Court is hereby ordered to release the defendant, Louie Ding, from custody, pending the termination of his appeal and the fulfillment of the conditions of the foregoing bond.

JEREMIAH NETERER, Judge.

WINTER S. MARTIN,

Asst. U. S. Attorney.

Approved this 13th day of June, 1916.

United States District Judge.

Indorsed: Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 13, 1915. Frank L. Crosby, Clerk. By Deputy.

No. 3282

**ORDER EXTENDING TIME TO JULY 22nd, 1916, FOR
SIGNING, ALLOWANCE AND FILING OF BILL
OF EXCEPTIONS**

Now on application of the defendants for an order extending the time for the signing, allowance and filing of the bill of exceptions herein, and cause being shown therefor, such application is granted and the time for the signing, allowance and filing of the bill of exceptions of the defendants is extended up to and including the 22nd day of July, 1916.

Done in open court this 13th day of July, 1916.

JEREMIAH NETERER, Judge.

WINTER S. MARTIN,

Asst. U. S. Attorney.

Indorsed: Order extending time to July 22, 1916, to file, etc., Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 13, 1916. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

No. 3282

BILL OF EXCEPTIONS

BE IT REMEMBERED, That this cause came on regularly for trial before the Hon. Jeremiah Neterer, one of the Judges of the above entitled court, on this the 24th day of May, 1916, before a jury, duly empanelled and sworn, the plaintiff being represented by Clay Allen, Esq., and Winter S. Martin, Esq., United States Attorney and Assistant United States Attorney, respectively, and the defendants Louie Ding and Louie Lung Gin, being represented by Thomas B. MacMahon and William R. Bell, Esq.; whereupon a trial was had and testimony offered and taken and proceedings had and done, of which the following are excerpts. That it has been stipulated that the following portions of said proceedings and testimony are the only portions thereof that defendants Louie Ding and Louie Lung Gin shall be required to incorporate in the printed record on their appeal herein.

(OPENING STATEMENT OF MR. MARTIN, DISTRICT ATTORNEY.)

“The conspiracy is alleged to have commenced, in the indictment, on the 10th day of December, 1915, in Seattle, and to have continued until certain overt acts were thereafter performed. The first overt act charged in the indictment is that Louie Lortie, one of the defendants, in Seattle on December 10th, did re-

ceive and take from the defendant Louie Ding a letter written in Chinese the contents of which were unknown to the grand jurors, a letter or card or some sort of writing in Chinese. The second overt act is, that Lortie in Seattle on December 10, 1915, gave his co-defendant Worthington the same letter, a letter written in Chinese, the contents of which were unknown, that is, he just simply passed this letter over himself to the other man, an act which is alleged to have been done in furtherance of, and for the purpose of executing this scheme, and executing the conspiracy. The third overt act is that Lortie, Worthington and Miller on December 11th, went on board a launch named 'Blanch W.'; the overt act is, that they went on board of this launch and went from this port to Vancouver in furtherance of the scheme. The fourth overt act is, that Miller and Worthington with seven Chinese laborers who are named as defendants in this case, went on board the launch at Vancouver and came back to Seattle on December 14th, leaving Vancouver on December 14th. The gist of that overt act is that Miller and Worthington with seven alien Chinese laborers—rather the fourth overt act is that they simply went on board the boat at Vancouver. And the fifth overt act is, they came from Vancouver to Seattle. And the sixth overt act is, that they came from—charges that Worthington and Miller operated, navigated and sailed that boat to this port. Those are the several overt acts charged against these defendants for the purpose of carrying out the conspiracy or unlawful agreement which had theretofore been entered into on the 10th day of December."

(Bill of exceptions, pages 4 and 5.)

The principal witness for the government, Louie E. Lortie testified as follows on this point:

Q. (By MR. MARTIN, District Attorney.)

“Did you have such a conversation with Ding?

A. Yes, sir.

Q. With the defendant Louie Ding in this case?

A. Yes, sir.

Q. Where was that conversation held, in Seattle?

A. In that flat.

Q. In that flat?

A. Yes, sir.

Q. When was that conversation as near as you can tell?

A. Oh, about a week before we started.

Q. What?

A. A week before we left Seattle for that particular trip.”

(Bill of Exceptions, page 21.)

Q. (By MR. MacMAHON, attorney for Louie Ding and Louie Lung Gin.) “When did you receive this letter—what year?

A. 1915.

Q. What month?

A. I don't remember.

Q. You don't remember the month? You would not remember the date?

A. No.

Q. It might have been any time during the year?

A. It was shortly before Christmas."

(Bill of Exceptions, page 81.)

Q. (By MR. MacMAHON.) "You fix the time the following morning or three days after you returned from this trip?

A. I met him?

Q. Yes.

A. Somewheres about that.

Q. It could not have been sooner or later, it was about that?

A. Yes, sir.

Q. Either the next morning or about three days?

A. Yes, sir."

(Bill of Exceptions, page 137.)

The witness Melvin B. Miller called by the Government testified in respect to the time as follows:

Q. (By MR. MARTIN, District Attorney.) "How soon after your arrival from Vancouver did that interview with Ding take place? How soon after you arrived from Vancouver?

A. About three or four days.

Q. Now, after that interview at the Northern Pacific Hotel, or N. P. Hotel, did you hold any

conversation with Ding at any time or place?

A. At that time I was speaking of in the room.

Q. Did you talk with Ding after that?

A. He called me up afterwards.

Q. By 'phone?

A. Yes, sir.

Q. What did he say to you on the 'phone?

A. He told me to leave town.

Q. What else did he say?

A. There was trouble."

(Bill of Exceptions, pages 114 and 115.)

Q. (By MR. MacMAHON, attorney for defendants Ding and Gin.) "Northern Pacific Hotel on 6th Avenue about three days after you returned from Vancouver?

A. I think it was the next day, we returned at night and he called me up the next morning.

Q. After you returned from Vancouver?

A. Yes, sir.

Q. Could not have been mistaken about it? Might have been some other Chinaman?

A. I know Mr. Ding.

Q. Could not have been any other Chinaman you met the next morning?

A. No, sir.

Q. It is this Chinaman on which I am placing my left finger on his right shoulder, you are sure of that?

A. That is the gentleman.

Q. You met him the morning that you returned from this smuggling trip to Vancouver?

A. No, the next morning.

Q. What morning?

A. Two or three days after that."

(Bill of Exceptions, pages 129 and 130.)

On this point a witness for the Government named Eric Olson testified as follows:

Q. (By MR. MacMAHON, attorney for Louie Ding and Louie Lung Gin.) "Could not be any mistake about this being December 12th?

A. No.

Q. When did these men leave your hotel?

A. I could not exactly tell; between nine and eleven in the forenoon.

Q. On December 12th?

A. Yes, sir.

Q. That is the last you saw of them?

A. Yes, sir, as near as I can remember.

Q. Did they telephone while they were there?

A. Not that I know of.

Q. Let me call your attention to the figures on this sheet '13' and right in the next column to the signature 'Wood,' can you tell me the date that this man registered at your hotel?

A. Yes, he paid for the 13th and 14th; this

fellow registered in during the day and stayed the 13th and 14th.

Q. What date did they register in the hotel as appears from the register?

A. December 12th.

Q. Did they leave December 12th?

A. Yes, sir."

(Bill of Exceptions, page 140.)

The witness for the Government, James P. Worthington testified as follows on this point:

Q. (By MR. MARTIN, District Attorney)
"Did you have occasion to go to Vancouver in December, 1915 for any purpose?

A. I contracted with Lortie to go there, yes, sir.

Q. Did Lortie and Miller go with you?

A. Yes, sir.

Q. Now, when did you first make arrangements to go on that trip?

A. Lortie called my house and informed my housekeeper he wanted to see me, that was the evening of the 9th of December.

Q. The evening of the 9th of last December?

A. Yes, sir, when I came home that evening she informed me, and I called him up and went up to his house the next morning.

Q. What did Lortie say to you?

A. He wanted me to go to Vancouver with him.

Q. For what purpose?

A. To get a load of Chinese and some opium."

(Bill of Exceptions, page 142.)

Q. (By MR. MacMAHON, attorney for defendants Ding and Gin.) "What day of the week did you leave Seattle?

A. Saturday.

Q. You are positive of that?

A. Yes, sir.

Q. What day of the month?

A. The 10th, I think.

Q. The 10th. You are positive of that, Saturday; the 10th of what month?

A. December.

Q. Saturday the 10th of December. What day did you arrive in Vancouver?

A. We arrived in Vancouver the 12th.

Q. What day was that?

A. Monday.

Q. What day did you leave Vancouver?

A. 16th—15th or 16th."

(Bill of Exceptions, page 170.)

Another witness called by the Government, J. E. Meeker, testified as follows on this point:

Q. (By MR. MARTIN, District Attorney.) "Do you know the defendant Lortie in this case?

A. Yes, sir.

Q. Did he buy oil from you last December?

MR. MacMAHON: I object to that whether he did or not; nothing to do with the smuggling charge.

THE COURT: He may answer.

MR. MacMAHON: Exception.

A. I cannot say what date in December.

Q. Did he buy any oil in December?

A. I think he did.

MR. MacMAHON: I object to his opinion.

Q. I hand you a memorandum and ask you if you can refresh your recollection as to the purchase of oil by Lortie from the memorandum handed you?

MR. MacMAHON: I object to it unless it is established what it is he hands to him; just picks something up.

THE COURT: If you can look at that and then know what it is—if you can tell when he did buy it.

A. That is not the name of his boat; that is not the name I knew the boat by. My best recollection the last time he was in there was three men aboard the boat.

Q. What name did you know Lortie by?

A. Lortie, that is the name I always put down; I have the date in my pocket, on the 11th he last came in there—that would be December.

Q. What is the date of the memorandum?

A. This is the 10th.

Q. 10th of the twelfth month?

A. Yes, sir.

Q. Is that made in your handwriting?

A. Yes, that is my writing.

Q. Made at the time of the sale?

A. Yes, sir.

Q. By you?

A. By me, yes, sir.

Q. Does your book correctly record the incident of that sale by you?

A. Yes, sir, the day and date and time it was filled."

(Bill of Exceptions, pages 218 and 219.)

After the Government had rested its case, the defense interposed a number of witnesses who testified that the defendant Louie Ding and the defendant Louie Lung Gin were absent from the city of Seattle and the state of Washington, during the month of December, 1915, at the time fixed by the indictment and the evidence of the Government, as when the conspiracy was alleged to have been entered into in the city of Seattle by said defendants.

The first witness called by the defense on this point was Lou Yee Kee, who testified upon this point as follows:

Q. By Mr. MacMAHON, (Attorney for defendants Ding and Gin.) "Were you manager of that hotel during December, 1915?"

A. I have been the manager there since the hotel was first opened.

Q. Were you manager during December, 1915?

A. Yes, sir.

Q. The witness is shown a book and asked what it is?

A. Record of the guests who took rooms in the hotel.

MR. MacMAHON: At this time we will ask that it be marked for identification, if you please. (Book marked Defendants' identified Exhibit 'B.')

Q. Does this register book now marked by the clerk 'Defendants' Exhibit B' for identification, show the record of guests that stopped at your hotel during the month of December, 1915?

A. Yes, sir.

Q. You are given Defendants' Exhibit B for identification and requested to turn to that part of the record in that book which shows the guests registering there during December, 1915.

A. Yes, I do so.

Q. Point to the page in December.

A. Started from December, 3rd.

Q. Now, commencing on the page you have pointed to as December 3rd, 1915, do you find any

record of Louie Ding, the defendant you recognized and identified, as having been registered at your hotel?

A. Yes, sir, right here.

Q. Point to it.

MR. MARTIN: I would like to ask concerning the entry, please.

THE COURT: Let us have the date where he pointed to.

Q. (By MR. MacMAHON.) What is the date?

A. December 3rd, beginning.

Q. What year?

A. Last year.

Q. In figures what year?

A. 1915."

(Bill of Exceptions, pages 317, 318 and 319.)

"A. I saw him every day at the time.

Q. What was the last day in December you saw him?

A. On the 21st, when he left the hotel.

Q. What was his answer?

A. On the 21st, when he left the hotel.

Q. On the 21st of December, 1915, was it?

A. Yes, sir."

(Bill of Exceptions, page 323.)

Q. (By MR. MacMAHON, attorney for Louie Ding and Louie Lung Gin.) "When was the last record by you of Ding's room rent in that book?

A. The 19th.

Q. When did you last see Ding in your hotel?

A. From the 3rd day until the 21st day when he left the hotel.

Q. Did you see him on the 21st of December?

A. Yes, sir."

(Bill of Exceptions, page 328.)

The next witness called by the defense who testified upon this point was Louis Tong, whose testimony upon this point was as follows:

Q. (By MR. MacMAHON.) "When was the first day in December, 1915, that you saw Louie Ding, the defendant at my left?

A. I saw him from the 1st until the 15th of that month.

Q. Is this the man that you saw in Portland? (Indicating Louie Ding.)

A. Yes, sir, he is that man; he is a merchant of Portland.

Q. Point to the man he means, Mr. Interpreter.

A. That man (indicating Louie Ding).

Q. You point to the man that he means that he saw in Portland; you point to him. (Witness indicates Louie Ding.)

Q. What days and dates in December did he see that man Louie Ding that he pointed at?

MR. MARTIN: I object to that on the ground he has already answered it; he said from the 1st to the 15th of December; question has been asked and answered.

THE COURT: I did not so understand it.

MR. MARTIN: He said from the 1st to the 15th.

Q. Is that correct, you saw this man Louie Ding, from December 1st to the 15th, 1915?

A. Yes, sir; I saw him at the railroad station on the 1st day he was leaving the station for the Exposition at San Francisco.

Q. 1st day of December, 1915?

A. Yes, sir, in the train.

Q. What was the last day in December that you saw Louis Ding anywhere?

A. I saw him in the store in Portland after he returned from his visit to the Fair, San Francisco, on the 15th.

Q. When?

A. 15th.

Q. Is that the last date you saw him?

A. I saw him a day or two after that, and then he left there for Seattle.

Q. Ask him if he knows what date Christmas comes on?

A. On the 25th, I think, if that is the turkey day, we had the turkey.

Q. And when did he last see Ding with reference to Christmas, before or after?

A. I saw him the day after Christmas, he returned to Portland from San Francisco.

Q. Where did he see the defendant after Christmas?

A. In my store in Portland."

(Bill of Exceptions, pages 523 and 524.)

The witness Louis Tong also testified as to the whereabouts of the defendant Louie Lung Gin, during the month of December, 1915, as follows:

Q. (By MR. MARTIN, District Attorney.) " * * * When did you first meet Louie Gin in December?

A. On the 15th, he took dinner with us before leaving the city.

Q. That is the man that took dinner with you that I am pointing to (indicating Louie Lung Gin)?

A. Yes, sir.

Q. He took dinner with you on the 15th of December, did he?

A. Yes, sir.

Q. And then he went down to California—down to visit the Exposition, did he?

A. He said he was going to Seattle, but I don't know where he was going after he leave the city.

Q. When, before the 15th of December, did you see this Louie Gin?

A. I see him every day, either in my store or I see him in his store.

Q. And is the man you said you met on December 1st?

A. I saw him.

Q. Was Louie Gin in Portland all last fall, if you know?

A. He was in Portland.

Q. Do you know whether he was in Portland from December 1st until December 15th?

A. Yes, sir, I remember we had business transactions, and we saw him in the store frequently—saw each other in the store.

Q. Where was he during the month of November, if you know?

A. I saw him very frequently during that month as he came to my store for goods.

Q. What makes you sure at this time it was the 15th of December he left Portland?

A. He was in Portland all the time until the day he told me that he was going to leave Portland, so we prepare a dinner especially on that occasion."

(Bill of Exceptions, pages 527 and 528.)

The defendant Louie Lung Gin called as a witness in his own behalf testified as to his where-

abouts during the month of December, 1915, as follows:

Q. (By MR. MacMAHON, his attorney.)

“Where were you living during December, 1915?

A. Portland, 227 Second Street * * *.

Q. (By MR. MARTIN, District Attorney.)

You say you can't understand English? Lung Gin, you say you lived in Portland last December?

A. I did.

Q. When were you in Seattle before last December?

A. October last year.

Q. Were you in Seattle during September of last year?

A. I wish to correct my former statement, in which I said I was here the tenth month, which I mean the Chinese tenth month, but now I testified in English language the tenth month which is equivalent to October.

Q. Were you in Seattle during the months of August and September of last year?

A. No.

Q. How long were you in Seattle during the month of October?

A. About two weeks.

Q. What were you doing here during that two weeks?

A. To collect outstanding debts * * *.”

Q. (By MR. MARTIN, District Attorney.)
“Were you here during the month of November at all, after you left about the 1st?

A. Not until the night of the 15th of December I came back here for the purpose of collecting the further debts I hadn’t collected.

Q. Collecting some other bills?

A. At the time.

Q. How long did you remain in Seattle when you came back in December?

A. Few days.

Q. How long; how many days?

A. About a week.

Q. Then did you go back to Portland?

A. Yes, sir.

Q. And were you in Portland during all that time after you got back until you were arrested?

A. Yes, sir.

Q. So that you were only here then two weeks during October, and about a week in December, during all of last fall?

A. That is all.”

(Bill of Exceptions, pages 540, 541, 542, 543.)

Another witness for the defense, G. Jung Chung, testified as to the whereabouts of the defendant Louie Ding in the month of December, 1915, as follows:

Q. (By MR. MacMAHON, attorney for Louie Ding and Louie Lung Gin.) "Do you know Louie Dong or Louie Ding?"

A. I know Louie Dong Ding.

Q. Is that his correct name as you know it?

A. Yes, sir.

Q. Point to him. (Witness points to Louie Ding.)

Q. How long have you known him?

A. Since the first of the twelfth month of last year.

Q. Where did you meet him?

A. At the railroad station.

Q. Where?

A. Seattle railroad station, the new railroad station, Seattle.

Q. Do you know the name of the railroad?

A. No; the Chinese refer to it as the new railroad station.

Q. What time of the day?

A. After 9 o'clock or 9:30.

Q. Morning or night?

A. Morning.

Q. What day of the month and month?

A. The 1st of December.

Q. What year?

A. 1915.

Q. What did you do?

A. I was going to take the train for Sacramento.

Q. Who took the train for Sacramento with you, and where did you take the train?

A. Louie Dong.

Q. Where did you go aboard the train?

A. At the new railroad station.

Q. Where did you go then, and who was with you when you got aboard the train?

A. Louie Dong was with me, both were going to Sacramento.

Q. And where did you really go?

A. I went to Stockton.

Q. Who went with you?

A. Louie Dong.

Q. Stockton in the state of California?

A. Yes, sir.

Q. Was Louie Ding or Louie Dong Ding with you all the way from Seattle on that same train—that same coach between Seattle and Stockton, California?

A. Yes, sir.

Q. When did you reach Stockton, California?

A. About eleven o'clock in the evening of the third day.

Q. Third day of what?

A. December.

Q. What did you do? When you reached there at eleven o'clock on the 3rd day of December, 1915, who was with you.

A. Louie Dong.

Q. Point to him." (Witness indicates Louie Ding.)

(Bill of Exceptions, pages 571 and 572.)

Henry Fried, another witness called by the defense testified as follows upon this point:

Q. (By MR. MacMAHON, attorney for Louie Ding and Louie Lung Gin.) "Do you know Louie Dong or Louie Dong Ding, that I am pointing to with my left hand?

A. Yes, sir, I have known him for two years; I became acquainted with him in the latter part of two years ago.

Q. Did you know him in December, 1915?

A. Yes, sir, about Christmas time last year.

Q. What was the first day in December that you saw him?

A. I saw him after he went to San Francisco that month, I saw him, after he returned from San Francisco, on either the 28th or 29th of that month.

Q. What date did he go to San Francisco?

A. The first day, I went to the railroad station with him and bid him good bye.

Q. First day of what?

A. December.

Q. What railroad station?

A. To a railroad station; I don't know how to describe it.

Q. Was it the new depot, or the old depot?

A. I didn't go on as far as to the railroad station, but went to the Fourth Avenue.

Q. What time of day was that?

A. Between eight and nine o'clock.

Q. When did you next see him?

A. I didn't see him until his return about Christmas time.

Q. Before or after Christmas?

A. A little over a day before Christmas."

(Bill of Exceptions, page 581.)

Louie Ding, the defendant called as a witness in his own behalf, testified as to his whereabouts during the month of December, 1915, as follows:

A. "I left Seattle on the 1st day of December, 1915.

Q. (By MR. MacMAHON, his attorney.) What road?

A. Well on the railroad.

Q. On what?

A. I catch the train.

Q. Where did you go?

A. First of December in the morning I leave Seattle half past nine, and then go through to

Portland, I think 3:55 or 3:40, something like that, and then we telephone up to Louie Turner he came down to the depot, to the train, and he meet me there; I just talking to him a few words, then I leave Portland for California.

Q. That was the first of December you say you left here?

A. Yes, sir, first of December.

Q. Who was on the train with you leaving Seattle, if you remember?

A. That man's name is Q. Jung Chung.

Q. You mean the witness that testified at noon?

A. Yes, sir.

Q. How far did he travel with you, and between what points?

A. The same train leave Seattle to California, leave Davis, California.

Q. You mean that witness went from Seattle as far as Davis, California, and then changed the train to Sacramento?

A. Yes.

Q. On the 2nd of December where did you travel to and from?

A. Second of December I left Davis to Sacramento the train about twenty minutes past five with G. Jung Chung and go to I street restaurant and eat dinner.

Q. Where did you go from Sacramento, on December 2nd?

A. On the 2nd day in the night time stop at Sacramento, night time about six o'clock, I talk with one Chinaman friend of mine, then me and G. Jung Chung meet me to Stockton, and the time I leave him I street to the station, what they call electric car.

Q. What is the fare from Sacramento to San Francisco; how much fare?

A. I never go Sacramento to San Francisco; I go Sacramento to Stockton the second day nine o'clock in the evening.

Q. Where did you go next?

A. What is that?

Q. Where did you go then?

A. At nine o'clock went through to Stockton, arrive there at Stockton ten minutes past eleven.

Q. How long did you stay there?

A. Well, I stayed second day night, we go to a rooming house, and the next day in the morning, third day morning at six o'clock we catch Santa Fe train to San Francisco.

Q. How long did you stay in San Francisco?

A. I stayed in San Francisco 3rd day up to 22nd.

Q. How many days were you in Stockton, California in December, 1915, and what days?

A. You mean Stockton or San Francisco?

Q. How many days were you in Stockton, California, during December, 1915?

A. December 2nd midnight; I was in Stockton December 13th in the morning, Stockton to San Francisco.

Q. How many days were you in San Francisco during December, 1915?

A. San Francisco December 3rd, and I stop at San Francisco to December 22nd.

Q. Where did you stop?

A. Moon Ming Hotel.

Q. Moon Ming Hotel?

A. Yes, sir.

Q. What address?

A. I don't remember the address.

Q. How many days were you at the Moon Ming Hotel in San Francisco; how many nights did you sleep there in December, 1915?

A. December 3rd to December 22nd, live at the Moon Ming Hotel, except December 15th, I left there one day.

Q. You left there one day?

A. December 15th, San Francisco to Stockton to Sacramento; come back in San Francisco, December 16th; came back to San Francisco same place.

Q. How many days were you in Sacramento?

A. Just a couple of hours.

Q. Then after December 16, 1915, when you came from Sacramento to San Francisco, how many days did you remain in San Francisco?

A. I think about seven or eight days.

Q. Seven or eight days. Who did you see in San Francisco during that time?

A. Well, Moon Ming Hotel, the manager there, and a friend he is in the mining business.

Q. Where did you go in San Francisco during that time?

A. What is that?

Q. Where did you go; what places did you go?

A. You mean in San Francisco?

Q. Yes.

A. We leave up to Stockton to San Francisco, December 3rd in the morning between half past nine and nine o'clock I stop with G. Jung Chung and go to 37 Washington Street and take breakfast, then hire an automobile and go to Fair Ground, that day big rain.

Q. What day did you go to the Fair Grounds—you mean the Panama Pacific Exposition?

A. Yes, sir.

Q. What day did you go there?

A. Third and fourth, both, two days, I was there.

Q. Third and fourth of December, 1915?

A. Yes, sir.

Q. Who accompanied you?

A. One man named Louie Chue and other man belong to the Chung Wing Company, father owns

the store, and little boy, I forget the name.

Q. What was the last day in December you were in Sacramento?

A. 22nd day I leave Sacramento about eight o'clock in the evening.

Q. Where was that you were at eight o'clock?

A. Eight o'clock in the evening?

Q. Where?

A. In San Francisco to Sacramento.

Q. Who did you see there? Did you transact any business?

A. We go up Sacramento 22nd and 23rd, I got drug store No. 113, I guess it is—in a drug store I meet a rich Chinese friend, and a white man, newspaper man.

Q. What is his name?

A. Turner."

(Bill of Exceptions, pages 604, 605, 606, 610, 611 and 612.)

After the Government had fixed the time of the formation of the conspiracy as being in the city of Seattle not earlier than the third day of December, 1915, and not later than the tenth day of December, 1915, and the evidence of the defense had established, that the defendant Louie Ding was in the state of California during all that period and that the defendant Louie Lung Gin was in the state of Oregon during all of that period, the court

gave the instruction complained of, as follows:

“Now in this case there was some evidence presented here by the defendant Ding of what is termed in some offenses as an alibi, that is, he was at another place at the time when the witnesses on the part of the government show, as they claim, that he was here and the conspiracy was entered into; and he could not have entered into the conspiracy because he was in California, for instance. Now you are instructed that if the defendant Ding was not here at the time that the conspiracy was entered into, of course, he would not, and did not, become a member of it afterwards, and, of course, he could not be held in this indictment. A party may be guilty of a conspiracy even though he is absent, however, in another state; his presence is not necessary, providing testimony would justify a conclusion that he entered into the conspiracy when he was absent. In this case the testimony is that the conspiracy was entered into while he was here. Now the testimony is somewhat indefinite as to just when that conspiracy was entered into. The Government charges it was entered into on the 10th day of December. Now it is not necessary that the government show that this conspiracy was entered into on the 10th day of December, if the testimony shows that the conspiracy was entered into at any time within three years prior to the time of the filing of this indictment by the grand

jury, which was on the 27th day of March, 1916, it would be sufficient, and it would be immaterial where the defendant Ding was at the time when the overt acts were done, or at the time when the co-conspirators went to British Columbia, if you find they did go to British Columbia and bring over, or attempt to bring over persons who were prohibited by law from entering the United States.”

(Bill of Exceptions, pages 675 and 676.)

The defendants excepted to this instruction before the jury retired to consider its verdict, as follows:

“We except further to the portion of the charge wherein Your Honor instructed the jury that the exact time of the conspiracy is not material, and it is sufficient if it appears beyond a reasonable doubt from the evidence that the conspiracy was entered into within three years prior to the return of the indictment in this case, for the reason that when the defense of alibi is interposed in a criminal case the element of time becomes material, as fixed by the evidence of the Government.”

(Bill of Exceptions, page 685.)

And thereupon the court again instructed the jury upon the subject of time and its materiality to the issue, as follows:

“My instructions with relation to the exact

time not being material may have been just a little general. Now while the law is, it being sufficient if the offense was proven at any time within three years prior to the time of the filing of the indictment, this conspiracy entered into and some overt act done, the conclusion must be arrived at from the evidence; you would not be justified in coming to a conclusion as to that arbitrarily, it must be predicated upon testimony, and that is submitted to you as to what the testimony is on the part of the Government, and on the part of the defense, with relation to that time, and you will conclude upon that evidence the testimony on the part of the government; you remember what it was, it is not necessary for me to refer to it, and you will determine whether it was inconsistent with any other testimony which was offered."

(Bill of Exceptions, pages 686 and 687.)

The defendant Louis E. Lortie, called as a witness by the Government, testified on direct examination, *inter alia*, as follows:

Q. (By MR. MARTIN, United States District Attorney.) "Leaving Mayne Island, where did you go, Mr. Lortie?

A. Vancouver.

Q. Tell us now, Mr. Lortie, in detail what you did in Vancouver.

A. We landed at the foot of Kitsilano Street car line by the dock.

Q. Is that on English Bay?

A. English Bay—on the eastern side, I think, of English Bay.

Q. What was then done?

A. We got off and went ashore and I went to Grant Street—either 1761 or 1861 Grant Street.

Q. Who live at that house on Grant Street?

A. A man by the name of Lim Jim.

Q. Mr. Lortie, speak up a little bit louder; the jurors have difficulty in hearing you at this end. Who is Lim Jim, if you know; what does he do; what is his business?

A. I believe he has stores in Vancouver.

Q. Do you know where his store is located?

A. I know, but still I could not swear to the street.

Q. Refreshing your recollection do you know whether it is on Carral Street, or not?

MR. MacMAHON: I object to him suggesting.

THE COURT: No, he may ask him.

MR. MacMAHON: Exception.

Q. Do you remember whether on Carral Street—565 Carral Street?

A. I believe that is the place.

Q. Can you tell us now what time in the day you made the trip from where you left the boat

out to Lim Jim's house on Highland Street?

MR. MacMAHON: I object because he has not mentioned Highland Street.

MR. MARTIN: I withdraw the question.

Q. Where did you go to visit Lim Jim—Grant Street, you said?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. What was the number on Grant Street?

A. 1761 or 1861, I am not sure.

Q. What time of the day did you go out to the Grant Street house?

A. I could not say.

Q. Do you know what Worthington and Miller did while you were gone, or where they went?

A. They delivered those letters.

Q. What if anything, did you say, or what was said to you by Lim Jim out on Grant Street?

MR. MacMAHON: I object, unless the defendants were present; Lim Jim is not one of the defendants nor named as a conspirator. (Question read.)

THE COURT: Who is Lim Jim?

MR. MARTIN: The man they were dealing with, whom the testimony will show received the letters.

THE COURT: You may answer.

MR. MacMAHON: Exception.

Q. The court says you can answer.

A. I made an agreement with him to get some opium.

Q. What was said concerning the opium; what was the agreement?

A. The agreement I was to be at the Kitsilano dock and it would be delivered there to me.

Q. How much opium was to be delivered to you?

A. I think it was 150 or 155 pieces.

Q. How much was to be paid you, if anything, for the delivery and transportation of this opium?

A. Two dollars apiece.

Q. Two dollars a tin?

A. Yes, sir.

Q. Did you then return to the boat?

A. Yes, sir * * *."

Q. "Tell me what was done after that; what you did, and what they all did.

A. I waited for the opium and a Chinaman came down to the dock and delivered the opium to me and I put it on the boat.

Q. How was the opium delivered—in what form?

A. In suit cases.

Q. Two suit cases?

A. Yes, sir."

(Bill of Exceptions, pages 27, 28, 29 and 30.)

Q. (By MR. MARTIN.) "Mr. Lortie, will you look at those two suit cases? Did you ever see those before?

A. They were just like that.

Q. Well, did you see them before, if at all?

A. I saw them the night we came down.

Q. And were the suit cases that you referred to as being put on your boat?

A. Yes, sir.

Q. Containing the seventy-five tins of opium each?

A. Yes, sir.

Q. In your judgment are these the cases?

A. I believe they are.

MR. MARTIN: We offer these two cases and the contents for identification as plaintiff's exhibits 3 and 4.

THE COURT: Let them be marked."

(Bill of Exceptions, page 45.)

Q. (By MR. MacMAHON, attorney for Louie Ding and Louie Lung Gin, on cross-examination.) "Then during all the time you described—I will make this general question to save a lot of cross-examination concerning Vancouver—all the time you were in Vancouver receiving, handling and transporting Chinese, opium, suit cases and other things you never saw Louie Ding, the Chinaman?

MR. MARTIN: I make the objection that the question is not definite enough.

MR. MacMAHON: He answers yes or no.

A. I never saw Louie Ding.

Q. I say during all the time you were in Vancouver to which you have testified on this particular trip, when you were delivering this letter in Vancouver, receiving as you said the two suit cases full of opium and the fourteen Chinese boys—taking them off the street car and putting them on your launch and leaving the dock and going away, did you see Louie Ding in Vancouver throughout your entire transaction?

A. No, sir."

(Bill of Exceptions, page 85.)

THE COURT: Is this cross-examination completed now?

MR. MacMAHON: Yes, sir.

Q. (MR. MARTIN.) You said you met Lim Jim and wanted to give an explanation where you met him but were not permitted; tell us where you met Lim Jim in Seattle.

A. In Louie Ding's place.

Q. When, where, under what circumstances?

A. No. I don't remember; in 1915.

Q. Do you remember when it was—1915?

A. Yes, sir.

Q. Before or after the Vancouver trip?

A. Before.

Q. How much before, or how long before?

A. A few months.

Q. What was said by Ding, Lim Jim or yourself upon that occasion?

A. There was an agreement made to go and get some opium for Louie Ding.

Q. Give us the entire conversation; tell me everything that was said.

MR. MacMAHON: I object if it was prior to the first date fixed in the indictment, the court has already ruled I cannot ask him concerning.

MR. MARTIN: Your cross-examination made it material.

THE COURT: Overruled.

MR. MacMAHON: Exception.

THE COURT: Noted.

Q. State the entire conversation on that occasion.

A. Louie Ding introduced him to me, and he told me he was a wealthy Chinaman in Vancouver, and he told me he wanted me to bring him some opium, and I went over and saw Louie Ding—or I met Jim Lim—Lim Jim I met in Vancouver.

Q. On the trip in question?

A. Yes, sir.

Q. Trip you have testified to in December?

A. The agreement I was to go and get this opium from Lim Jim.

Q. How much were you to receive for getting the opium, or for the opium?

A. I was to receive two dollars from this man when I got there.

Q. Two dollars for what?

A. Apiece.

Q. Apiece—what do you mean, apiece?

A. A can.

Q. Per can?

A. Yes, sir.

Q. How many cans were there in each of the dress suit cases at the time?

A. I don't remember. When I got there it seems that Louie was going to—.

MR. MacMAHON: I object to his conclusions—he said what seems to him.

THE COURT: State what was said.

A. The agreement was—Louie introduced me to this man—.

Q. By Louie you mean Louie Ding or the Louie in Vancouver?

A. Louie Ding introduced me to him at his place on King Street.

Q. 666?

MR. MacMAHON: There is a self-serving declaration.

THE COURT: No. Let him state where it was.

A. On King Street in the Milwaukee Block—in the gambling house; he introduced him to me and he told me his friend—.

MR. MacMAHON: I object on the ground this is a repetition of his answer to the question.

THE COURT: Proceed, he stated it.

Q. Who do you mean by 'he'—he told you.

A. Louie Ding.

Q. What did he tell you?

A. He told me to go over and get this opium, and the next time he probably would give me more."

(Bill of Exceptions, pages 96, 97 and 98.)

The witness Melvin B. Miller, called by the Government, testified in respect to this opium, as follows:

Q. (By MR. MARTIN, District Attorney.) "Did Lortie tell you how much money you were to receive on this trip for bringing these Chinese in?

A. No, sir.

MR. MacMAHON: I object to the question as being suggestive and leading.

THE COURT: No. He may answer.

Q. Was any mention made?

A. No arrangements made as to how much I was to get.

Q. Do you know how much Lortie was to get?

A. One hundred dollars a head.

Q. One hundred dollars a head. Was anything said about getting any opium in Vancouver?

A. Yes, sir.

Q. By whom, and when?

A. Mr. Lortie.

Q. During the trip?

A. Yes, sir.

Q. What was said about the opium?

A. Just said he didn't know how much he would get, but he would get some.

Q. Do you know how much Lortie was to receive for bringing the opium in?

A. He told me two dollars a tael * * *.

Q. How many Chinese came to the boat?

A. Fourteen.

Q. Do you know whether any opium was brought to the boat or not, or put aboard the boat?

A. I don't know anything about that * * *.

A. Mr. Lortie said, 'We are subject to a pinch most any time; the revenue men are after us,' and he told Mr. Worthington, he said 'Go to the boat and take these two suit cases off.'

Q. You did not see the suit cases?

A. No, sir.

Q. What then?

A. Mr. Worthington proceeded, I guess, to get the suit cases off; Mr. Lortie told me to go on home."

(Bill of Exceptions, pages 107, 108, 110 and 113.)

Q. (By MR. MacMAHON, attorney for Louie Ding and Louie Lung Gin, on cross-examination.)
“Did you see anyone take these two suit cases of opium from anywhere?”

A. I saw those yesterday in the room.

Q. Who showed them to you?

A. I saw them in the court room.

Q. That was the first place you did see them?

A. Yes, sir.

Q. That is all you know about them?

A. Yes, sir.”

(Bill of Exceptions, page 127.)

The witness James F. Worthington, called by the Government testified in respect to this opium, as follows:

Q. (By MR. MARTIN, District Attorney.)
“Did you have occasion to go to Vancouver in December, 1915, for any purpose?”

A. I contracted with Lortie to go there, yes sir.

Q. Did Lortie and Miller go with you?

A. Yes, sir.

Q. Now when did you first make arrangements to go on that trip?

A. Lortie called my house and informed my

housekeeper he wanted to see me, that was the evening of the 9th of December.

Q. The evening of the 9th of last December?

A. Yes, sir, when I came home that evening she informed me, and I called him up and went up to his house the next morning.

Q. What did Lortie say to you?

A. He wanted me to go to Vancouver with him.

Q. For what purpose?

A. To get a load of Chinese and some opium
* * *.

Q. How many Chinese came to your boat?

A. Fourteen. Louie brought eleven and the other party didn't bring his six; he brought the six, he had them on the car and three didn't get off, they went on across the creek, across to Kitsilano; we lost them.

Q. Do you know whether those Chinese had been down the evening before?

A. What is that?

Q. Do you know whether those six had been down the night before?

A. They had went over there and we were not there, at least I was not there.

Q. Did you see any opium or other merchandise brought on board?

A. No, that was put on while I was up in town, seeing the Chinese * * *.

Q. Did you see any suit cases on the boat that night?

A. Yes, sir. I had two of them.

Q. Mr. Worthington, will you come down from the witness stand and examine these suit cases and contents.

A. Yes, sir, those are the ones.

Q. Look at this one, ever see that before?

A. Yes, sir.

Q. Where?

A. Those two were the ones on the boat.

Q. What was done with them?

A. I took them off the boat and put them under the dock.

Q. At the foot of Harrison Street?

A. Yes, sir.

Q. What night did you return to the Port of Seattle?

A. What night I got into Seattle?

MR. MARTIN: I now offer in evidence these two suit cases that were marked for identification, Your Honor.

MR. MacMAHON: I would like to inquire whether you had had them open before the District Attorney?

A. Yes, I carried them.

Q. Where?

A. On board the boat.

Q. What for?

A. To look in them to see what was in there.

Q. How do you know they are the same now as they were then?

A. In fact I can swear it was the same.

Q. Did you count the number of tins?

A. No, I didn't count them.

Q. Have you ever seen other tins of opium besides these anywhere?

A. Yes, several of them.

Q. Did they all look alike?

A. Not all of them.

Q. Did you ever see any like this—looked like these?

A. Yes, sir.

Q. You saw similar tins to these?

A. Yes.

Q. You don't know whether there is the same number in this suit case as when you looked at it?

A. I don't know only what Lortie told me there was a hundred and fifty-five cans all together.

Q. You never counted them?

A. I never counted them.

Q. You don't know what is in them except what he told you?

A. I know there is opium in there.

MR. MacMAHON: We object to their admission.

THE COURT: Admitted.

MR. MacMAHON: Exception.

THE COURT: Note an exception."

(Bill of Exceptions, pages 142, 149, 150, 152 and 153.)

"At the close of the foregoing evidence in chief, offered by the plaintiff the counsel for defendants moved the court to direct a verdict for the defendants, submitting the same and the reasons therefor verbally in the words and figures following:

MR. MacMAHON: May I have the fourteen minutes remaining before adjournment to prepare a motion?

THE COURT: No, we will proceed now.

MR. MacMAHON: I wish to make a motion for a directed verdict.

THE COURT: Proceed.

MR. MacMAHON: Your Honor has heard the testimony concerning the defendants and all of them—

THE COURT: Make the motion without arguing.

MR. MacMAHON: I move Your Honor for a directed verdict as to the Chinese defendants, particularly as to the seven Chinese defendants whom no one here has recognized. Your attention is called to the testimony of the clerk Jackson who recognized no Chinese defendant at all, and only

mentioned the Japanese automobile driver, Ito. He testified he was personally present, he rode in the automobile with all the Chinese but would not identify or point out any one of the Chinese defendants; he only named a single person, that is the defendant here whose case has been severed from the others, that of the Japanese chauffeur, Ito.

THE COURT: Motion denied as to each of the defendants. Exception noted.

(Bill of Exceptions, page 463.)

The defendant Louie E. Lortie, called as a witness on behalf of the Government, testified *inter alia* on direct examination, as follows:

Q. (By MR. MARTIN, Assistant District Attorney) "Do you know the defendant Louie Ding in this case?"

A. Yes, sir.

Q. How long have you known him?

A. Oh, less than a year, I think.

Q. Do you know Louie Lung Gin, the defendant?

A. Well, about the same time.

Q. About the same length of time?

A. Yes, sir.

Q. Do you know what relation, if any, Louie Lung Gin bears to the defendant Louie Ding?

A. Yes, sir.

Q. What is the relation?

A. His nephew.

Q. Where is Louie Ding's place of business, if you know, or where was it in December—in the fall of 1915?

A. Excuse me, I want to finish that.

Q. Yes.

A. I knew him as his nephew through Louie; Louie told me he was his nephew.

Q. Where was Louie Ding's place of business in the fall of 1915?

A. He had a gambling house on King Street.

Q. What was the number on King Street?

A. I could not tell the number, it is in the Milwaukee building.

Q. Do you know of any building or flats or any apartment house that either Louie Ding or Louie Lung Gin had anything to do with last fall?

A. Yes, sir.

Q. Where was that?

A. On Main Street.

Q. What was it, a house?

A. A flat.

Q. Do you remember the number?

A. I think it was 1037.

Q. 1037?

A. Yes, it is on Main Street near 12th.

Q. On Main Street near 12th Avenue?

A. Yes, sir, on the south side of Main Street.

Q. How many rooms in the flat?

A. There is, I think four, maybe more—might be four or five.

Q. What, if you know, was the purpose of that flat—who lived there—what was it used for?

A. Well, I don't know who lived there; I know the boys were supposed to be taken there.

Q. What do you mean by 'boys.'

A. The Chinamen.

Q. What, if any, conversations did you have with Louie Ding in December of last year concerning any Chinese boys, or Chinese men?

A. Prior to this trip you mean?

Q. Yes, before you went on this trip, what, if any conversations did you have with Ding about bringing Chinese into the country?

A. I had the address of the Chinese, and I understood he would not be there, and I was to deliver them at this flat.

Q. Did you have such a conversation with Ding?

A. Yes, sir.

Q. With the defendant Louie Ding in this case?

A. Yes sir.

Q. Where was the conversation held, in Seattle?

A. In that flat.

Q. In that flat?

A. Yes, sir.

Q. When was that conversation as near as you can tell?

A. Oh, about a week before we started.

Q. What?

A. A week before we left Seattle for that particular trip.

Q. Did you receive anything from Louie Ding at that time?

A. I did.

Q. What?

A. Part of a letter * * *.

Q. What did you do—what steps did you take after you learned that the officers were about to arrest or catch the Chinese, what did you do?

MR. MacMAHON: I submit he has answered; he said he did nothing but wait.

THE COURT: Answer.

Q. Sir?

A. I overlooked something; I went down and seen Louie Lung Gin.

Q. Where did you meet Louie Lung Gin?

A. I met him at the flat 1037 Main Street.

Q. In the day or night, if you remember?

A. In the night; I think; I don't remember for sure, either.

Q. What did you say to Mr. Louie Lung Gin, or what did he say to you, during that meeting?

A. I told him about the trouble—he and another man, I believe China Dan was with him—I explained it to the two of them.

Q. Was China Dan present?

A. Yes, sir.

Q. What did you say to them?

A. I told them about the trouble, in fact they knew all about it; they knew as much about it as I did.

Q. Was any mention made in the conversation of the newspaper articles?

MR. MacMAHON: I object to the suggestion.

THE COURT: Let him state what was said and done without suggesting—if he knows.

MR. MARTIN: I am only calling his attention—

THE COURT: Let him state first.

Q. What was said and done, Mr. Lortie? What was said between you and Dan and Louie Lung Gin upon this occasion during the interview?

A. We just talked about the case; no agreement made how we should take them off or anything.

Q. During that conversation, let me ask you, was any reference—during the conversation made to the newspaper article concerning the expected arrest of these Chinese?

MR. MacMAHON: I most respectfully call your Honor's attention to the fact after you have repeatedly sustained the objection to that testimony he makes the same suggestions.

THE COURT: No, I think the suggestion is proper; the witness' attention was called to it; his memory is refreshed so that the jury will understand all the circumstances.

MR. MacMAHON. Exception. (Question read.)

A. Yes, sir.

Q. What was said, Mr. Lortie?

A. I said they had a slim chance; they mentioned they might get in all right, and told me to—I was to let them know as soon as they got in.

Q. What did they say about the newspaper article?

A. I could not say what they said; they talked so much I could not state what was said right then, until the boat got in * * *.

Q. Who did you meet at the flat, if any one?

A. China Dan and Louie Lung Gin.

Q. Louie Lung Gin?

A. This man sitting over there.

Q. Stand up, Louie Lung Gin. Is that the man? That is Louie Lung Gin that you met?

A. Yes, sir.

Q. What time in the evening, if you remember, did this meeting take place at the flat?

A. Oh, after dark—shortly after dark.

Q. After dark. What was said at the interview by Louie Lung Gin or Dan or yourself concerning this case?

MR. MacMAHON: I submit he has answered they were excited and could not remember what was said.

MR. MARTIN: This is not the same interview at all; the second interview.

THE COURT: Proceed.

A. I told him I did not know how to get the boys out of that as they were down there—got in all right.

Q. Down where?

A. Down at the foot of Harrison Street.

Q. In this city?

A. Yes, sir.

Q. Was that the substance of the telephone message which you had received?

MR. MacMAHON: I object to that.

THE COURT: Mr. Martin, I have ruled upon that, after I have ruled upon a matter there is no use in repeating it.

MR. MARTIN: If he repeated the message to these defendants, doesn't that render it material Your Honor; isn't it competent if he repeated the messages to these defendants?

THE COURT: Unless he told them the conversation.

MR. MARTIN: He did.

THE COURT: Proceed, let him state what the conversation was; let us find out. What did you say to Dan and Louie Lung Gin; give me the details of the conversation.

A. I explained to him I received a telephone—

Q. What did you say to them about that message? Tell me what you said to them.

A. I didn't know how to go and get them; he said he would go and get a machine; I says, 'We are in danger of getting grabbed.' I said, 'Now, you can suit yourself; I am afraid to go down there myself;' so he said, 'I will get a machine;' I said, 'I will go on down there ahead anyway'; and I went down town.

Q. Who said that, Lortie, if you remember?

A. China Dan stated—done the talking, most of it, but Louie Lung Gin was there too.

Q. Did he join in the conversation, if you remember?

A. Yes, sir, the conversation was between the two, but China Dan done the talking * * *. As soon as I located Mr. Worthington and Mr. Miller, I saw them smoking, I went up to them, when I got close they recognized me; as soon as I got close one of the boys said, 'You are under arrest,' I said, 'We are pretty close to it'; he said, 'the officers

are hiding here and watching us, I have already seen them'; I said to Mr. Miller, 'You better go home'; I told Mr. Worthington to take the boat, and in the meantime I expected the machine down; I walked up around, and I saw a good many watching there, I saw several men, something with lanterns underneath, and more than I supposed were officers, long black coats, I would not recognize them, if I seen them now—I know there was officers down there, and pretty soon I heard the machine coming, and the first thing I noticed was Louie Lung Gin, this man sitting over there, I met him down there, and he would not—it seems he would not go over there. I told him I did not want to go to the dock; I told him to go to the dock and speak to the Chinese and tell them—I didn't know for sure whether the machine had come down, I told him to tell them to get out one by one after awhile.

Q. Do you know how Louie Lung Gin came to the scene; do you know how he came there?

A. No.

Q. What?

A. No.

Q. Did you see the machine then?

A. No, sir, not just then.

Q. You met Louie Lung Gin then on foot.

A. Yes, sir.

Q. Proceed with your narrative.

MR. MacMAHON: I submit there is no question.

A. I would like to make that plain, just a few minutes before the machine got down there.

Q. Yes.

A. Finally the machine came down, I heard the machine coming, and I walked up the hill and met the machine coming down and they stopped, turned the lights on and I turned my back, and I met a man there, a stranger I had never seen before, he looked at me and I turned my head the other way as soon as the machine got down, and I walked down and I found Louie Lung Gin with that man over there whatever his name is (indicating defendant Ito).

Q. Is that the man you met?

A. Yes, sir.

Q. The defendant Louie Lung Gin in this case?

A. Yes, sir, at least it looks very much like the man, he cut his hair different.

Q. Yes.

A. So I heard the machine coming down and I met the machine, and I let it get—then I went down and showed them where the boys were. I went down—walked down to the dock and I told them to go down there and talk to them in the Chinese language; I told them that the suit cases were there.

Q. Who did you tell that to, Lortie?

A. Louie Lung Gin. I walked away from there then—I stepped back of the machine as soon as they had them located, I walked away, I walked up on the hill, I thought they had got away all right as soon as I heard some one hollering ‘Lortie,’ I heard the machine stop then I listened to them—had another machine there, and I think—I could not see very well, but I think they put part in one machine and left the rest in the other. That is the last I know of it.

Q. What did you do after the arrest, Lortie?

A. I went home?

Q. Did you see Worthington or Miller after that?

A. The next morning I went down and saw Worthington, and I think I went to see Mr. Miller too, and I told them what I noticed—what I saw, that the boys were grabbed.

Q. Where did you go after that?

A. I don’t know.

Q. Let me ask you this, did you go out of the state?

A. Not just then.

Q. What if anything was said during your last interview with Louie Ding as to where Mr. Ding would be when you arrived with the Chinese?

MR. MacMAHON: Now, I object to the suggestive question which indicates the answer.

THE COURT: No; what was said with relation to that, if anything?

A. Where Mr. Ding would be?

Q. Yes, what was said by Mr. Ding as to where he would be—where Ding would be when you arrived with the Chinese.

A. Prior to this you mean?

Q. Yes.

A. I was to deliver them at this flat.

Q. Was anything said by Louie Ding as to where he, Ding, would be when you got back?

A. Yes, sir, he would be in California.

Q. What else was said by Ding when he made that statement to you?

A. China Dan and Louie's nephew were to take care of them, he was to pay me.

Q. How much were you to receive for bringing in these Chinese?

A. One hundred dollars apiece * * *.

Q. Mr. Lortie will you look at those two suit cases? Did you ever see those before?

A. They were just like that.

Q. Well, did you see them before, if at all?

A. I saw them the night we came down.

Q. And were the suit cases that you referred to as being put on your boat?

A. Yes, sir.

Q. Containing the seventy-five tins of opium each?

A. Yes, sir.

Q. In your judgment are those the cases?

A. I believe they are.

Q. I hand you a photograph and ask you if you identify any one of the men in this photograph.

A. Number one I recognize as China Dan.

Q. Is China Dan the defendant referred to in your testimony in this case?

A. Yes, sir.

MR. MARTIN: I offer the photograph of China Dan, the other defendant—I offer that in evidence.

THE COURT: Any objection?

MR. MacMAHON: I object on the ground they are in no wise connected with the case, nor do they affect the defendant on the witness stand, or any of the defendants.

THE COURT: Is he one of the defendants?

MR. MARTIN: China Dan is one of the defendants.

MR. MacMAHON: He has not been apprehended and is not on trial.

THE COURT: Objection overruled; whichever one is the defendant, you better mark that. Let the witness mark the individual by some character. Let him mark a cross above China Dan.

(Witness marks cross above China Dan as directed.)
Photograph received in evidence and marked,
"Plaintiff's Exhibit No. 5."

(Bill of Exceptions, 19, 20, 21, 35 to 46 inc.)

R. W. BARKER, called as a witness on behalf of the Government, testified on direct examination, inter alia, as follows:

Q. (By MR. MARTIN, Assistant District Attorney.) "Your full name, Mr. Barker?"

A. R. W. Barker.

Q. You live in Seattle?

A. Yes, sir.

Q. Employed by the John Davis Company?

A. Yes, sir.

Q. How long have you been so employed?

A. About five years.

Q. Do you have charge of the rentals for that firm?

A. I did until about three weeks ago, of that particular department.

Q. I hand you a rental contract and ask you if that is the rental contract with John Davis Company?

MR. MacMAHON: I object, it speaks for itself; it is a written instrument.

THE COURT: It speaks for itself.

Q. Can you identify the instrument; is that one of your contracts?

A. Yes, sir.

Q. That covers the premises at 1037 Main Street?

MR. MacMAHON: I object to him telling him what premises it covers.

THE COURT: It speaks for itself.

MR. MARTIN: I understand I may ask some preliminary questions concerning the document?

THE COURT: Proceed.

MR. MacMAHON: I think there is not a word of evidence that would justify it being submitted—

THE COURT: Make your objection.

MR. MARTIN: I will withdraw the offer for a moment.

Q. I hand you a photograph and ask you if you can identify any of the men in that photograph?

A. The one marked '1' seems more familiar.

Q. What is your recollection as to seeing the man marked '1' there?

A. The party came in and rented a flat on Main Street.

Q. What number?

A. 1037.

Q. Is that the contract which I have referred to and handed you—is that the contract covering that house?

A. Yes, sir.

MR. MARTIN: Photograph, Your Honor, of the defendant Dan, by other testimony. I now offer in evidence the contract.

MR. MacMAHON: We wish to offer an objection to both. I object on the ground that the signed contract in no way indicates by any word written upon it either in the signature or in the body of the instrument anything connecting these defendants, or any of them, with the case at bar. It is contended by the District Attorney that the person who signed that, China Dan, is in some way connected with this case. We are not responsible for the acts of undisclosed persons who are either fugitives or otherwise; and we object to the introduction of photographs that have not been connected up with the case and with which we have nothing to do and with contracts of which this appears to be a copy—

Q. (Mr. MacMAHON.) Isn't it?

A. This is the original.

Q. What writing is the original?

A. This is the original contract.

THE COURT: Overruled.

MR. MacMAHON: Exception

THE COURT: Noted. Admitted. (Rental contract received in evidence and marked 'Plaintiff's Exhibit No. 12'; and photograph received in evidence and marked 'Plaintiff's Exhibit No. 5.')

Q. What is your recollection as to the man or the person who paid the rent on this flat?

A. I only collected the first month's rent.

Q. What member of the firm would know, if you know?

A. I doubt if any would know; the cashier is here.

Q. Possibly he could state.

THE COURT: Proceed.

Q. Do you know when the premises at 1037 Main Street were occupied?

A. Occupied from October 10th to February 10th.

Q. At what rental?

A. Eighteen dollars a month.

MR. MARTIN: (Addressing the jury), Plaintiff's Exhibit No. 12 is the rental contract. I will read it to you.

MR. MacMAHON: I object to him reading the contract at this time.

THE COURT: He may read it, it is in evidence. (Mr. Martin reads exhibit 12 to jury.)

Q. Is that your signature, Mr. Barker?

A. Yes, sir.

Q. Hing Lee, is that the signature of the man whom you have identified and who entered into that contract with you?

A. The man that rented the flat.

Q. What if anything did this man who came there to engage that flat say about the flat?

MR. MacMAHON: I object unless one of the defendants were present.

THE COURT: Overruled.

MR. MacMAHON: Exception.

A. You want me to tell the entire proceeding about it?

Q. No, state what he said.

A. My recollection is, that this Chinese came in and inquired about the flat—spoke about it on one or two occasions; about the 5th of October, or the 2nd of October, I think it was and said there was a friend of his in Portland that wanted the flat, was going to get married, and would not be in until late Saturday night, the 9th; he eventually came back and got the key and went through the flat, and was that afternoon I gave it to him, and he came back and said he would take it for his friend if it was repaired—some broken windows; so on the 5th of October he came in and paid a month's rent, and rented the flat for his supposed-to-be friend; was little objection in regard to starting the rent that day inasmuch as his friend would not be in for a few days—

MR. MacMAHON: I object to what his friend told him.

THE COURT: Overruled.

A. (Continuing)—his friend would not be in for a few days, and he thought we should split the difference and start the rent the day he would come which was on Sunday the 10th.”

(Bill of Exceptions, 207, 208, 209, 210.)

Thomas Fisher being called as a witness on behalf of the plaintiff, testified on direct examination *inter alia* as follows:

A. “About six P. M. that evening I went to Chinatown with Mr. Jackson and Patterson of the Immigration Service in a machine belonging to Mr. Jackson, for the purpose of locating and watching the movements of the defendant Louie Lung Gin and China Dan.

Q. Who is China Dan, what did you have to do with him?

A. What?

Q. Who is China Dan or Ng Dan; how long have you known him?

A. I have known him twenty years, I expect.

Q. Proceed with your statement, Mr. Fisher.

A. While we were looking for him, or for either of the two men, our machine broke down on King Street; leaving Patterson and Jackson to get the machine out of the road and arrange to have it fixed, I went on foot around Chinatown.

Q. Where did you leave Patterson and Jackson on King Street?

A. On King Street between 7th and 8th Avenues South.

Q. What did you do then?

A. Oh, possibly thirty minutes or three-quarters of an hour after I left them as I was coming around to go up Jackson Street I saw Dan and Louie Lung Gin coming down Jackson Street.

Q. From what direction were Dan and Louie Lung Gin approaching?

A. Coming west on Jackson Street, they were at the time I first saw them just east of 8th Avenue South.

Q. Do you know the premises at 1037 Main Street, Mr. Fisher?

A. Yes sir.

Q. What kind of a building is 1037 Main Street?

A. It is a flat building, also stores were in the building.

Q. How near 12th Avenue South?

A. It is about a quarter of a block.

Q. Is 11th Avenue cut through to Jackson Street at that point?

A. No sir.

Q. And with reference now to the flat, 1037 Main Street and its position, where was Dan and

Louie Lung Gin when you first saw them that evening?

A. They were coming from that direction.

Q. On Jackson Street?

A. Yes sir; owing to the fact of regrading the hill is sliding, and the street is caved in; Jackson Street is the only original way of reaching that point from that part of town.

Q. What did you do after you saw them at 8th and Jackson Street walking west?

A. I stepped around the corner and let them come down Jackson Street; after they passed me I followed them.

Q. Where did they go, and what did they do after that?

A. Went down Jackson Street to Maynard.

Q. What?

A. They went down Jackson to Maynard, down Maynard to King Street.

Q. Maynard on what street?

A. Between 6th and 7th.

Q. They turned from Jackson onto King?

A. Went down Maynard to King and there they stopped and talked to some man in the rear of an automobile—in the shadow of an automobile. It was raining a little bit at that time and I had my umbrella up, I was across the street and I walked across, and as I passed by Dan saw me and

recognized me and said something to Louie Lung Gin, and he turned around and looked at me; I stepped around the corner and stepped up into a lodging house named Fuge; I looked from the second story window over where they were standing, they talked a few minutes, and went away hurriedly up King Street as far as 8th Avenue, they turned around and they came back again down and stopped for a minute, and went back up and turned towards 8th Avenue and Jackson Street; I left the place as they went up the street and followed them; I didn't dare to get too close to them; after that I saw them standing near the machine between—just east of 8th Avenue on Jackson, an automobile run by Mr. Ito there.

Q. Mr. Ito.

A. Yes sir.

Q. Did you see Louie Lung Gin take this machine, or step into this machine?

A. I didn't see him step into the machine; I went on back down King Street, after I heard them talking—I hurried down King Street and across Jackson Street to Maynard Avenue, and when I looked up Jackson Street, I didn't see the machine and thought they had gone; thought they had gone. I met Mr. Patterson and hired a taxicab and started for the north end of the water front."

(Bill of Exceptions, 269, 270, 271, 272.)

MR. BELL: (Attorney for defendants Louie Lung Gin and Louie Ding)

“If your Honor please, before counsel for the Government proceeds with his argument, we desire to interpose at this time. the testimony being entirely closed, a motion for a directed verdict as to all of the Chinese defendants. And we desire to be heard for a few minutes in support of that motion, and more particularly in reference to the seven Chinese who were transported, and who are named as defendants in this indictment.

THE COURT: Have both sides rested?

MR. BELL: We so understand.

THE COURT: Has the Government rested?

MR. MARTIN: (District Attorney) Yes, Your Honor.

THE COURT: You want to be heard on the motion, Judge?

MR. BELL: Yes, Your Honor, briefly. I want to say that my argument will be limited to the position occupied by the seven Chinese who were transported. (Argument.)

THE COURT: The motion is denied.” (This motion was based upon the same grounds as the motion for directed verdict interposed at the close of the Government’s case in chief.)

(Bill of Exceptions, 665.)

The Court instructed the jury, *inter alia*, as follows:

“Now, a reasonable doubt is just such a doubt for which you can give a reason. When a juror is convinced to a moral certainty of the truth of the fact then he is convinced beyond a reasonable doubt. It is not a doubt which is imaginary, conjectural or speculative. Sometimes we say a reasonable doubt is such a doubt as a reasonable person in determining an issue of like concern to himself as that before the jury to the defendant would make him pause or hesitate in arriving at his conclusion.”

(Bill of exceptions, page 682.)

To this instruction the defendants duly excepted as follows:

MR. BELL: (Attorney for Louie Ding and Louie Lung Gin) “The defendants desire to except further to the definition which Your Honor gave on a reasonable doubt, particularly that portion of the charge where you stated to the jury that a reasonable doubt was one which they must be able to give a reason for.”

(Bill of exceptions, page 685.)

The Court further instructed the jury, as follows:

“Neither are you concerned with the fact that the defendants who are charged in this indictment with the commission of this offense in con-

junction with the other defendants, entered a plea of guilty, have not been sentenced; that is not a matter for your concern; that will be disposed of by the proper officers of this court, but you can take that into consideration, together with all the evidence of the witnesses that was presented here upon the witness stand, the demeanor of these defendants in their testimony, and determine, if you believe that they have been promised immunity or anything of that kind, will take that into consideration in weighing their testimony, but if from all of the circumstances as disclosed in this case by the witnesses, you believe that should not be given any weight or emphasis, you will so disregard it; otherwise you will consider it in a way that you, as twelve honest, fair-minded men believe it should be considered."

(Bill of Exceptions, page 681.)

To this instruction the defendants Louie Ding and Louie Lung Gin duly excepted as follows:

MR. BELL (Attorney for Louie Ding and Louie Lung Gin): "The defendants further except to the portion of the charge to the jury wherein Your Honor instructed them, that the fact that the defendants who have plead guilty—that the fact that certain defendants who have testified in this case have plead guilty is no concern of the jury."

(Bill of Exceptions, page 685.)

The jury retired to consider their verdict, and having returned into court a verdict against the de-

fendants, Louie Ding, Louie Lung Gin, Jue Lee, Sam Yuen, Fong Wee, Wong Ding, Ng Wah, Lock Wah and Wong Wing; and afterwards, to-wit: the 12th day of June 1916, the defendants Louie Ding and Louie Lung Gin, moved the court to set aside said verdict and grant a new trial, as follows:

“Comes now the defendants, Louie Ding and Louie Lung Gin, and move the court to set aside the verdict of the jury rendered herein on the 2nd day of June 1916, and grant a new trial, for the reason and upon the following grounds:

1. That said verdict is against and contrary to law.

2. That said verdict is against and contrary to the evidence.

3. Insufficiency of the evidence to justify the verdict.

4. Errors of law occurring during the trial, and excepted to at the time by the said defendants.

5. Erroneous instructions given to the jury by the trial judge, and particularly that part of the instructions wherein the trial judge instructed the jury that they would be justified in finding said defendants guilty if the evidence established beyond a reasonable doubt that the offense charged in the indictment had been committed any time within three years prior to the filing of said indictment.”

Which motion for a new trial was, after argument by counsel for and against the motion, respectively, and after due consideration by the court on the 12th day of June, 1916, overruled.

No. 3282

STIPULATION

It is stipulated by and between the plaintiff in the above entitled cause, and the defendants Louie Lung Gin and Louie Ding, through their respective attorneys, that the foregoing, being those portions of the original bill of exceptions herein which support the defendants' assignments of errors, is all of the original bill of exceptions that need be incorporated in the printed record on appeal. In preparing the printed record all captions except on Writ of Error, Citation on Writ of Error, and Order Allowing Writ of Error may be omitted.

Dated at Seattle, this 3rd day of March, 1917.

CLAY ALLEN and WINTER S. MARTIN,
Attorneys for Plaintiff.

WALTER S. FULTON and WM. R. BELL,
Attorneys for Defendants Louie Ding and
Louie Lung Gin.

Indorsed: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Mar. 3, 1917. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

No. 3282

PETITION FOR WRIT OF ERROR

To the Honorable Jeremiah Neterer, Judge of the District Court aforesaid:

Now comes the defendants Louie Ding, and Louie Lung Gin, by their attorneys, Walter S. Fulton and W. R. Bell, and respectfully show that on the 24th day of May, 1916, a jury duly impanelled herein found your petitioners guilty of criminal conspiracy and upon said verdict sentences were passed and final judgments were entered against your petitioners on the 12th day of June 1916.

Your petitioners feeling themselves aggrieved by said verdict and judgment entered thereon as aforesaid herewith petition the court for an order allowing them to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under the laws of the United States in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error be issued and that an appeal in this behalf to the Circuit Court of Appeals aforesaid, situated in San Francisco in said Circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made approving the bonds heretofore furnished by your petitioners and staying all further proceedings until the determination of said writ of

error by the said Circuit Court of Appeals, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

WALTER S. FULTON and
WM. R. BELL,

Attorneys for defendants Louie Ding and
Louie Lung Gin.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western District of Washington, Northern Division, Nov. 8, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

No. 3282

ASSIGNMENT OF ERRORS

Now come the defendants Louie Ding and Louie Lung Gin and in connection with their petition for writ of error in this cause assign the following errors which said defendants aver occurred on the trial thereof and upon which they rely to reverse the judgment entered herein, as appears of record:

I.

That the court erred in instructing the jury that it was not necessary for the government to establish by the evidence that the conspiracy alleged in the indictment was entered into on the tenth day of December 1915, the date alleged in the indictment, and that it was sufficient if the evidence disclosed

that the conspiracy was entered into at any time within three years prior to the filing of the indictment by the grand jury, to-wit within three years of the 15th day of March 1916. Said instruction was as follows:

“Now in this case there was some evidence presented here by the defendant Ding of what is termed in some offenses as an alibi, that is, he was at another place at the time when the witnesses on the part of the Government show, as they claim, that he was here and the conspiracy was entered into; and he could not have entered into the conspiracy because he was in California, for instance. Now you are instructed that if the defendant Ding was not here at the time that the conspiracy was entered into, of course, he would not, and did not, become a member of it afterwards, and, of course, he could not be held in this indictment. A party may be guilty of a conspiracy even though he is absent, however, in another state; his presence is not necessary, providing testimony would justify a conclusion that he entered into the conspiracy when he was absent. In this case the testimony is that the conspiracy was entered into while he was here. Now the testimony is somewhat indefinite as to just when that conspiracy was entered into. The Government charges it was entered into on the 10th day of December. Now it is not necessary that the Government show that this conspiracy was entered into on the 10th day of December, if the testimony shows that the conspiracy was entered into at any time within three years prior to the time of the filing of this indictment by the grand jury, which was on the 27th day of March 1916, it would be sufficient, and it would

be immaterial, where the defendant Ding was at the time when the overt acts were done, or at the time when the co-conspirators went to British Columbia, if you find they did go to British Columbia, and bring over, or attempt to bring over persons who were prohibited by law from entering the United States."

The defendants excepted to this instruction before the jury retired to consider its verdict, as follows:

"We except further to the portion of the charge wherein Your Honor instructed the jury that the exact time of the conspiracy is not material, and it is sufficient if it appears beyond a reasonable doubt from the evidence that the conspiracy was entered into within three years prior to the return of the indictment in this case, for the reason that when the defense of alibi is interposed in a criminal case the element of time becomes material, as fixed by the evidence of the Government."

And thereupon the court again instructed the jury upon the subject of time and its materiality to the issue, as follows:

"My instruction with relation to the exact time not being material may have been just a little general. Now while the law is, it being sufficient if the offense was proven at any time within three years prior to the time of the filing of the indictment, this conspiracy entered into and some overt act done, the conclusion must be arrived at from the evidence; you would not be justified in coming to a conclusion as to that arbitrarily, it must be predicated upon testimony, and that is submitted to you as to what the testimony is on the part of the Government,

and on the part of the defense, with relation to that time, and you will conclude upon that evidence the testimony on the part of the Government; you remember what it was, it is not necessary for me to refer to it, and you will determine whether it was inconsistent with any other testimony which was offered."

II

The court erred in admitting in evidence, over the objection of the defendants, as part of the Government's case in chief, two suit cases and their contents consisting of about one hundred and fifty cans of opium, for the reason that the defendants were not charged in the indictment with illegally importing opium.

III

The court erred in denying the motion of the defendant Louie Lung Gin for a directed verdict of acquittal made at the close of the Government's case in chief, which motion was based upon the following grounds:

(a) Insufficiency of the evidence to establish the existence of any conspiracy to import alien Chinese;

(b) Insufficiency of the evidence to show that said defendant knew of or was connected with the alleged conspiracy during its existence;

(c) That the alleged conspiracy was consummated and merged into the substantive offense of importing a prohibited class of aliens.

IV.

The court erred in denying the motion of the defendant Louie Ding for a directed verdict of acquittal made at the close of the Government's case in chief, which motion was based upon the following grounds:

(a) Failure of the plaintiff to establish by proof the existence of a conspiracy to import alien Chinese;

(b) Insufficiency of the evidence to show that said defendant knew of or was connected with the alleged conspiracy during its existence;

(c) That the alleged conspiracy was consummated and merged into the substantive offense of importing a prohibited class of aliens.

V.

The court erred in denying the motion of the defendant Louie Lung Gin for a directed verdict made at the close of the entire case, which motion was based upon the same grounds as were urged by said defendant upon his motion for a directed verdict made at the close of the Government's case in chief.

VI.

The court erred in denying the motion of the defendant Louie Ding for a directed verdict made at the close of the entire case, which motion was

based upon the same grounds as were urged by said defendant upon his motion for a directed verdict made at the close of the Government's case in chief.

VII.

The court erred in instructing the jury that a reasonable doubt is one for which the jurors could give a reason. The instruction complained of is as follows:

“Now a reasonable doubt is just such a doubt for which you can give a reason. When a juror is convinced to a moral certainty of the truth of the fact then he is convinced beyond a reasonable doubt. It is not a doubt which is imaginary, conjectural or speculative. Sometimes we say a reasonable doubt is such a doubt as a reasonable person in determining an issue of like concern to himself as that before the jury to the defendant would make him pause or hesitate in arriving at his conclusions.”

To this instruction, the defendants duly excepted as follows:

MR. BELL (Attorney for Louie Ding and Louie Lung Gin) “The defendants desire to except further to the definition which your Honor gave on a reasonable doubt, particularly that portion of the charge where you stated to the jury that a reasonable doubt was one which they must be able to give a reason for.”

VIII.

The court erred in instructing the jury that it was not concerned with the three defendants, Lortie, Miller and Worthington, who had pleaded guilty and were awaiting sentence at the time they testified on behalf of the Government. The instruction complained of is as follows:

“Neither are you concerned with the fact that the defendants who are charged in this indictment with the commission of this offense in conjunction with the other defendants, entered a plea of guilty, have not been sentenced; that is not a matter for your concern; that will be disposed of by the proper officers of this court, but you can take that into consideration, together with all the evidence of the witnesses that was presented here upon the witness stand, the demeanor of these defendants in their testimony, and determine, if you believe that they have been promised immunity or anything of that kind, will take that into consideration in weighing their testimony, but if from all of the circumstances as disclosed in this case by the witnesses, you believe that should not be given any weight or emphasis, you will so disregard it; otherwise you will consider it in a way that you, as twelve honest, fair-minded men believe it should be considered.”

To this instruction the defendants Louie Ding and Louie Lung Gin duly excepted as follows:

MR. BELL (Attorney for Louie Ding and Louie Lung Gin) “The defendants further except to the portion of the charge to the jury wherein

Your Honor instructed them, that the fact that the defendants who have plead guilty—that the fact that certain defendants who have testified in this case have plead guilty is no concern of the jury.”

IX.

The court erred in denying the motion of the defendant Louie Ding for a new trial, made upon the following grounds:

“(1) That said verdict is against and contrary to law. (2) That said verdict is against and contrary to the evidence. (3) Insufficiency of the evidence to justify the verdict. (4) Errors of law occurring during the trial, and excepted to at the time by the said defendants. (5) Erroneous instructions given to the jury by the trial judge, and particularly that part of the instructions wherein the trial judge instructed the jury that they would be justified in finding said defendants guilty if the evidence established beyond a reasonable doubt that the offense charged in the indictment had been committed any time within three years prior to the filing of said indictment.”

X.

The court erred in denying the motion of the defendant Louie Lung Gin for a new trial, made upon the following grounds:

“(1) That said verdict is against and contrary to law. (2) That said verdict is against and con-

trary to the evidence. (3) Insufficiency of the evidence to justify the verdict. (4) Errors of law occurring during the trial, and excepted to at the time by the said defendants. (5) Erroneous instructions given to the jury by the trial judge, and particularly that part of the instructions wherein the trial judge instructed the jury that they would be justified in finding said defendants guilty if the evidence established beyond a reasonable doubt that the offense charged in the indictment had been committed any time within three years prior to the filing of said indictment.”

XI.

The court erred in sentencing the defendant Louie Ding to serve a term of two years' imprisonment in the United States penitentiary at McNeil's Island in the State of Washington, and to pay a fine of \$500.00.

XII.

The court erred in sentencing the defendant Louie Lung Gin to serve a term of fifteen months' imprisonment in the United States penitentiary at McNeil's Island in the State of Washington.

WHEREFORE, defendants Louie Ding and Louie Lung Gin pray that the judgment of said court be reversed and this cause remanded to the said District Court with directions to dismiss the same and discharge said defendant from custody and exonerate the sureties on his bail bond.

WM. R. BELL and WALTER S. FULTON,
Attorneys for defendants Louie Ding
and Louie Lung Gin.

Filed this 8th day of November, 1916.

FRANK L. CROSBY, Clerk,

By Ed M. Lakin, Deputy.

Clerk of the United States District Court, for
the Western District of Washington, Northern
Division.

Indorsed: Assignment of Errors. Filed in the
U. S. District Court, Western Dist. of Washington,
Northern Division, Nov. 8, 1916. Frank L. Crosby,
Clerk. By Ed M. Lakin, Deputy.

*United States District Court, Western District of
Washington, Northern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES F. WORTHINGTON, MELVIN B. MILLER, LOUIE E. LORTIE, LOUIE DING, ENG DAN, alias NG DAN, alias CHINA DAN, LOUIE LUNG GIN, ATSHUSHI ITO, JUE LEE, SAM YUEN, FONG WEE, WONG DING, NG WAH, LOCK WAH and WONG WING,

Defendants.

No. 3282

ORDER ALLOWING WRIT OF ERROR

Now on this 8th day of November 1916, came the defendants Louie Ding and Louie Lung Gin by their attorneys, Walter S. Fulton and W. R. Bell, and filed herein and presented to the court their petition, praying for the allowance of a writ of error intended to be urged by them praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises; and that an order be made approving the bond heretofore furnished by the defendants Louie Ding and

Louie Lung Gin and staying all further proceedings until the determination of said writ of error by the said Circuit Court of Appeals.

Now, on consideration of said petition and being fully advised in the premises, the court does hereby allow the said writ of error.

And it is hereby ordered that the security heretofore furnished by the defendants Louie Ding and Louie Lung Gin for his appearance whenever required according to the conditions of their bond, is hereby approved and all further proceedings are hereby suspended herein until the determination of said writ of error by the said Circuit Court of Appeals.

And it is further ordered that the defendants Louie Ding and Louie Lung Gin shall be released from custody pending the hearing and determination of said writ of error.

JEREMIAH NETERER,

Judge of the United States District Court for the Western District of Washington, Northern Division.

No. 3282. Original. In the District Court of the United States for the Western District of Washington, Northern Division, United States of America, Plaintiff, vs. Louie Lung Gin, et al., Defendants. Order Allowing Writ of Error. Filed

in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 8, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

No. 3282

**ORDER EXTENDING TIME TO FILE TRANSCRIPT OF
RECORD**

Now, upon this 26th day of February, 1917, comes on to be heard the motion of the defendants Louie Ding and Louie Lung Gin for an order extending the time to file the transcript of the record on appeal herein, the said defendants appearing through their counsel, and the United States of America appearing through its counsel and consenting to such order.

It is, therefore, hereby ordered that the time heretofore allowed in which to file the transcript of the record herein in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same hereby is, extended to the twentieth day of March 1917.

Done in open court this 26th day of February, 1917.

JEREMIAH NETERER,
Judge.

We consent to the entry of the above order:
CLAY ALLEN,
Attorney for Plaintiff.

Indorsed: Order Extending Time to File Transcript of Record. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 25, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

No. 3282

STIPULATION AS TO RECORD

It is hereby stipulated between the plaintiff and the defendants Louie Ding and Louie Lung Gin, through their respective attorneys, that the following designated papers comprise all of the papers, exhibits and other proceedings which are necessary to the hearing of this cause upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit and that none but such papers need be included in the records of said court:

Indictment.

Warrant and return.

Plea.

Impanelling of jury.

Verdict.

Motion for new trial.

Order overruling motion for new trial, and motion in arrest of judgment.

Bond.

Bill of exceptions.

Petition for writ of error.

Assignment of errors.

Allowance of writ of error.

Writ of error.

Citation on writ of error.

Order extending time for serving and filing bill
of exceptions.

Order extending time for filing record.

Stipulation as to record.

Clerk's certificate.

It is also stipulated that the original exhibits herein may be attached to the record by the clerk and transmitted to the Circuit Court of Appeals and the same need not be printed.

CLAY ALLEN,
WINTER S. MARTIN,
Attorneys for Plaintiff.

WALTER S. FULTON,
WM. R. BELL,
Attorneys for defendants,
Louie Ding and Louie Lung Gin.

Indorsed: Stipulation as to record. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 14, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

*United States of America, Western District of
Washington—ss.*

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify that the foregoing 109 printed pages numbered from 1 to 109, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated ~~for~~ by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Plaintiff in Error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to wit:

Clerk's fee (Sec. 828 R. S. U. S.), for making record, certificate or return, 210 folios at 15c	\$31.50
Certificate of Clerk to transcript of record, 4 folios at 15c60
Seal to said Certificate20
Certificate of Clerk to original exhibits— 3 folios at 15c45
Seal to said Certificate.....	.20
Statement of cost of printing said transcript of record, collected and paid.....	151.25
Total	<hr/> \$184.20

I hereby certify that the above cost for prepar-
ing and certifying record amounting to \$~~184.20~~,
has been paid to me by Messrs. Wm. R. Bell and
Walter S. Fulton, Attorneys for Plaintiff in Error.

I further certify that I hereto attach and here-
with transmit the original Writ of Error and origi-
nal Citation issued in this cause.

In Witness Whereof I have hereto set my hand
and affixed the seal of said District Court, at Se-
attle, in said District, this 15th day of March,
1917.

(SEAL) FRANK L. CROSBY,
Clerk U. S. District Court.

*In the United States Circuit Court of Appeals,
Ninth Circuit.*

LOUIE DING, and LOUIE LUNG GIN,
Plaintiffs in Error,
vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 3282

WRIT OF ERROR

*United States of America, Ninth Judicial Circuit—
ss.*

THE PRESIDENT OF THE UNITED STATES
OF AMERICA:

To the Honorable Judge of the District Court
of the United States for the Western District of
Washington, Northern Division:

Because in the record and proceedings, as also
in the rendition of judgment, of a plea which is in
the said District Court before you, between the
United States of America, as plaintiff and Louie
Ding and Louie Lung Gin and others, as defend-
ants, a manifest error hath happened, to the great
damage of the said defendants Louie Ding and
Louie Lung Gin, as by their complaint appears, and
we being willing that error, if any hath been, should
be corrected, and full and speedy justice done to

the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the state of California, where said court is sitting within thirty days from the date hereof in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States of America, this 8th day of November, 1916.

FRANK L. CROSBY,

(SEAL)

Clerk of the United States District Court for the Western District of Washington, Northern Division.

Allowed this 8th day of November, 1916, after plaintiffs in error had filed with the clerk of this court with their petition for a writ of error their assignment of errors.

JEREMIAH NETERER,

Judge of the District Court of the United States, for the Western District of Washington, Northern Division.

Copy of within Writ of Error received and acknowledged this 8th day of November, 1916.

CLAY ALLEN,
WINTER S. MARTIN,
Attorneys for Plaintiff.

Indorsed: No. 3282. Original. In the United States Circuit Court of Appeals, Ninth Circuit. Louie Ding and Louie Lung Gin, Plaintiffs in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 8, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES F. WORTHINGTON, MELVIN B. MIL-
LER, LOUIE E. LORTIE, LOUIE DING,
ENG DAN, alias NG DAN, alias CHINA
DAN, LOUIE LUNG GIN, ATSHUSHI ITO,
JUE LEE, SAM YUEN, FONG WEE, WONG
DING, NG WAH, LOCK WAH and WONG
WING,

Defendants.

No. 3282

CITATION ON WRIT OF ERROR

To the United States of America, Greeting:

You are hereby cited and admonished to be
and appear at a session of the United States Circuit
Court of Appeals for the Ninth Circuit to be holden
at the city of San Francisco, state of California,
within thirty (30) days from the date hereof, pur-
suant to a writ of error filed in the clerk's office of
the District Court of the United States for the
Western District of Washington, Northern Division,
wherein Louie Ding and Louie Lung Gin are plain-
tiffs in error, and the United States of America is
defendant in error, to show cause, if any there be,
why the judgment rendered against the said plain-

tiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Jeremiah Neterer, Judge of the United States District Court for the Western District of Washington, Northern Division, this 8th day of November 1916.

JEREMIAH NETERER,

(SEAL)

Judge.

Copy of within Citation on Writ of Error received and due service of the same acknowledged this 8th day of November, 1916. Clay Allen; Winter S. Martin, Attorneys for Plaintiff.

Indorsed: No. 3282. Original. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff, vs. Louie Lung Gin, et al., Defendants. Citation on Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 8, 1916. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

No. 2955

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS²
FOR THE NINTH CIRCUIT

LOUIE DING AND LOUIE LUNG GIN,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION

HON. JEREMIAH NETERER, Judge.

Brief of Plaintiffs in Error **F. D. Monckton**
Clerk

WALTER S. FULTON, and
WILLIAM R. BELL,
Attorneys for Plaintiffs in Error

1112 Hoge Building, Seattle, Wash.

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UPON WRIT OF ERROR TO THE UNITED
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WESTERN DISTRICT OF WASH-
INGTON, NORTHERN
DIVISION

HON. JEREMIAH NETERER, Judge.

Brief of Plaintiffs in Error

STATEMENT OF THE CASE

The indictment in this case charged the plaintiffs in error Louie Ding and Louie Lung Gin together with other defendants named therein with a conspiracy to violate section 11 of the Act of Congress of May 6, 1882, as amended by the Act of

July 5, 1884, relating to the bringing into the United States from a foreign country of aliens not lawfully entitled to enter. To this indictment, the plaintiffs in error entered a plea of not guilty. (Trans. pages 1 to 7, 12)

After a trial upon the merits, plaintiffs in error were found guilty and a motion for new trial having been interposed in due time, and denied, sentence was imposed. The plaintiff in error Louie Ding was sentenced to serve a term of two years in the Federal penitentiary at McNeil's Island in the State of Washington, and to pay a fine of five hundred dollars, and the plaintiff in error Louie Lung Gin was sentenced to serve a term of fifteen months in the Federal penitentiary at McNeil's Island in the State of Washington. (Trans. pages 14-15, 17.)

In due time a writ of error was prosecuted and the judgment complained of is now before this court for review. (Trans. pages 94 to 106.)

The evidence of the Government disclosed that one of the defendants in the court below, Louie E. Lortie, who had entered a plea of guilty as charged before a trial upon the merits was had and Louie Ding, one of the plaintiffs in error, about the tenth of December 1915 and not earlier than the fourth of December 1915, conspired together for the purpose of bringing into the State of Washington from the

Province of British Columbia a number of alien Chinese persons not lawfully entitled to enter the United States, that for the purpose of carrying out said conspiracy the said Louie Ding entrusted to Louie E. Lortie a certain letter or writing of identification to be presented to another Chinaman in Vancouver, British Columbia, that thereafter on the tenth day of December 1915, certain other defendants who also pleaded guilty to the indictment, named James F. Worthington and Melvin B. Miller, with knowledge of its existence and purposes, joined in and became parties to the said unlawful conspiracy, that thereafter, on the 11th day of December 1915, the defendants Lortie, Worthington and Miller went from the port of Seattle in the State of Washington to the port of Vancouver in the Province of British Columbia on the launch "Blanche W." belonging to one of the conspirators, in furtherance of the general scheme or plan and, upon arrival in the port of Vancouver, one of the conspirators, Worthington, went to the address furnished by the plaintiff in error Louie Ding and arranged for the importation of fourteen alien Chinese, that on the 14th of December 1915 these alien Chinese were brought on board the said launch while she was lying in the port of Vancouver, B. C. and were brought to the city of Seattle, arriving on the 15th or 16th day of December 1915, and being discharged from

the launch at the foot of Harrison Street in the said city. (Trans. pages 23 to 32.)

At the time of the first conference between the defendant Lortie and the plaintiff in error Louie Ding it was arranged that the alien Chinese, if successfully imported, should be delivered at a certain flat or apartment, number 1037 Main Street, in the city of Seattle and that after the landing of the alien Chinese at the foot of Harrison Street, the said defendant Lortie repaired to the address given and notified another of the defendants, and an alleged conspirator, China Dan, and the plaintiff in error Louie Lung Gin of the arrival and also informed them of the fact that there was likely to be trouble in as much as the Federal immigration officials were aware of the surreptitious arrival of the Chinese. The conversation at the flat was between the defendant Lortie and the defendant China Dan, the plaintiff in error Louie Lung Gin being present, but not participating. On the same evening and just before the alien Chinese were taken in custody by the immigration officers, the plaintiff in error Louie Lung Gin was seen in the company of a Japanese named Ito near the landing place at the foot of Harrison Street in the city of Seattle. (Trans. pages 63 to 76.)

In the course of the Government's case in chief, evidence was introduced in relation to two suit cases

containing 150 or 155 five tael tins of opium, and these two suit cases with their contents were admitted in evidence over the objection of the plaintiffs in error. (Trans. 55, 56, 61, 65, 66.) The bringing in of this opium was in no way connected with the conspiracy charged in the indictment, but was an independent venture of the defendant Lortie in which his codefendants were in no wise interested. (Trans. pages 54, 55, 56, 58, 59, 63, 64, 65.)

At the close of the Government's case in chief, a motion for directed verdicts of acquittal was interposed on behalf of plaintiffs in error and after argument was denied. (Trans. pages 66, 67.)

After the Government had rested, evidence was introduced on behalf of the plaintiffs in error to show that they were not present in the city of Seattle at the time when the Government claimed the conspiracy had been formed, but were absent from the state of Washington from the first day of December 1915, until, in the case of Louie Ding the 26th day of December 1915, and, in the case of Louie Lung Gin, the 15th of December 1915. (Trans. pages 33, 49.)

At the conclusion of the entire case, and before the court's instructions were given, the plaintiffs in error renewed their motion for a directed verdict of acquittal, which motion was denied, and an exception allowed. (Trans. page 89.)

After argument by counsel for the respective parties, certain instructions, which are specifically set forth in the assignments of error herein and upon which error is predicated, were given to the jury.

ASSIGNMENTS OF ERROR

I.

The court erred in instructing the jury that it was not necessary for the government to establish by the evidence that the conspiracy alleged in the indictment was entered into on the tenth of December 1915, the date alleged in the indictment, and that it was sufficient if the evidence disclosed that the conspiracy was entered into at any time within three years prior to the filing of the indictment by the grand jury, to-wit, within three years of the 15th day of March 1916. Said instruction was as follows:

“Now in this case there was some evidence presented here by the defendant Ding of what is termed in some offenses as an alibi, that is, he was at another place at the time when the witnesses on the part of the Government show, as they claim, that he was here and the conspiracy was entered into; and he could not have entered into the conspiracy because he was in California, for instance. Now you are instructed that if the defendant Ding was not here at the time

that the conspiracy was entered into, of course, he would not, and did not, become a member of it afterwards, and, of course, he could not be held in this indictment. A party may be guilty of a conspiracy even though he is absent, however, in another state; his presence is not necessary, providing testimony would justify a conclusion that he entered into the conspiracy when he was absent. In this case the testimony is that the conspiracy was entered into while he was here. Now the testimony is somewhat indefinite as to just when that conspiracy was entered into. The Government charges it was entered into on the 10th day of December. Now it is not necessary that the Government show that this conspiracy was entered into on the 10th day of December; if the testimony shows that the conspiracy was entered into at any time within three years prior to the time of the filing of this indictment by the grand jury, which was on the 27th day of March 1916, it would be sufficient, and it would be immaterial, where the defendant Ding was at the time when the overt acts were done, or at the time when the co-conspirators went to British Columbia, if you find they did go to British Columbia, and bring over, or attempt to bring over persons who were prohibited by law from entering the United States." (Trans. page 50.)

The plaintiffs in error excepted to this instruction before the jury retired to consider its verdict, as follows:

"We except further to the portion of the charge wherein Your Honor instructed the jury that the exact time of the conspiracy is not

material, and it is sufficient if it appears beyond a reasonable doubt from the evidence that the conspiracy was entered into within three years prior to the return of the indictment in this case, for the reason that when the defense of alibi is interposed in a criminal case the element of time becomes material, as fixed by the evidence of the Government." (Trans. page 51.)

And thereupon the court again instructed the jury upon the subject of time and its materiality to the issue, as follows:

"My instructions with relation to the exact time not being material may have been just a little general. Now while the law is, it being sufficient if the offense was proven at any time within three years prior to the time of the filing of the indictment, this conspiracy entered into and some overt act done, the conclusion must be arrived at from the evidence; you would not be justified in coming to a conclusion as to that arbitrarily, it must be predicated upon testimony, and that is submitted to you as to what the testimony is on the part of the Government, and on the part of the defense, with relation to that time, and you will conclude upon that evidence the testimony on the part of the Government; you remember what it was, it is not necessary for me to refer to it, and you will determine whether it was inconsistent with any other testimony which was offered." (Trans. pages 51, 52.)

II.

The court erred in admitting in evidence, over the objection of the plaintiffs in error, as part of the Government's case in chief, two suit cases, and their contents consisting of about one hundred and fifty cans of opium, for the reason that the plaintiffs in error were not charged in the indictment with illegally importing opium.

The proceedings and evidence in this regard were as follows:

“Q. (By Mr. Martin, District Attorney) Did you see any opium or other merchandise brought on board?

A. (By the witness, James F. Worthington) No, that was put on while I was up in town, seeing the Chinese * * *

Q. Did you see any suit cases on the boat that night?

A. Yes sir, I had two of them.

Q. Mr. Worthington, will you come down from the witness stand and examine these suit cases and contents?

A. Yes, sir, those are the ones.

Q. Look at this one, ever see that before?

A. Yes, sir.

Q. Where?

A. Those two were the ones on the boat.

Q. What was done with them?

A. I took them off the boat and put them under the dock.

Q. At the foot of Harrison street?

A. Yes, sir.

Q. What night did you return to the Port of Seattle?

A. What night I got into Seattle?

MR. MARTIN: I now offer in evidence these two suit cases that were marked for identification, Your Honor.

MR. MacMAHON: I would like to inquire whether you had them open before the District Attorney?

A. Yes, I carried them.

Q. Where?

A. On board the boat.

Q. What for?

A. To look in them to see what was in there.

Q. How do you know they are the same now as they were then?

A. In fact, I can swear it was the same.

Q. Did you count the number of tins?

A. No, I didn't count them.

Q. Have you ever seen other tins of opium besides these anywhere?

A. Yes, several of them.

Q. Did they all look alike?

A. Not all of them.

Q. Did you ever see any like this—looked like these?

A. Yes, sir.

Q. You saw similar tins to these?

A. Yes.

Q. You don't know whether there is the same number in this suit case as when you looked at it??

A. I don't know only what Lortie told me there was a hundred and fifty-five cans all together.

Q. You never counted them?

A. I never counted them.

Q. You don't know what is in them except what he told you?

A. I know there is opium in there.

MR. MacMAHON: (Attorney for Plaintiffs in Error) We object to their admission.

THE COURT: Admitted.

MR. MacMAHON: Exception.

THE COURT: Note an exception." (Trans. pages 63 to 66).

III.

The Court erred in denying the motion of the plaintiff in error Louie Lung Gin for a directed verdict of acquittal made at the close of the Government's case in chief, which motion was based upon the following grounds:

(a) Insufficiency of the evidence to establish the existence of any conspiracy to import alien Chinese;

(b) Insufficiency of the evidence to show that said plaintiff in error knew of or was connected with the alleged conspiracy during its existence;

(c) That the alleged conspiracy was consummated and merged into the substantive offense of importing a prohibited class of aliens.

IV.

The Court erred in denying the motion of the plaintiff in error Louie Ding for a directed verdict of acquittal made at the close of the Government's case in chief, which motion was based upon the following grounds:

(a) Failure of the plaintiff to establish by proof the existence of a conspiracy to import alien Chinese;

(b) Insufficiency of the evidence to show that

said plaintiff in error knew of or was connected with the alleged conspiracy during its existence.

(c) That the alleged conspiracy was consummated and merged into the substantive offense of importing a prohibited class of aliens.

V.

The Court erred in denying the motion of the plaintiff in error Louie Lung Gin for a directed verdict of acquittal made at the close of the entire case, which motion was based upon the same grounds as were urged by said plaintiff in error upon his motion for a directed verdict made at the close of the Government's case in chief.

VI.

The Court erred in denying the motion of the plaintiff in error Louie Ding for a directed verdict of acquittal made at the close of the entire case, which motion was based upon the same grounds as were urged by said plaintiff in error upon his motion for a directed verdict made at the close of the Government's case in chief.

VII.

The Court erred in instructing the jury that a reasonable doubt is one for which the jurors could

give a reason. The instruction complained of is as follows:

“Now a reasonable doubt is just such a doubt for which you can give a reason. When a juror is convinced to a moral certainty of the truth of the fact then he is convinced beyond a reasonable doubt. It is not a doubt which is imaginary, conjectural or speculative. Sometimes we say a reasonable doubt is such a doubt as a reasonable person in determining an issue of like concern to himself as that before the jury to the defendant would make him pause or hesitate in arriving at his conclusions.” (Trans. page 90).

To this instruction the plaintiffs in error duly excepted as follows:

MR. BELL: (Attorney for plaintiffs in error) “The defendants desire to except further to the definition which Your Honor gave on a reasonable doubt, particularly that portion of the charge where you stated to the jury that a reasonable doubt was one which they must be able to give a reason for.” (Trans. page 90).

VIII.

The Court erred in instructing the jury that it was not concerned with the three defendants, Lortie, Miller and Worthington, who had pleaded guilty and were awaiting sentence at the time they testified on behalf of the Government. The instruction complained of is as follows:

“Neither are you concerned with the fact that the defendants who are charged in this indictment with the commission of this offense in conjunction with the other defendants, entered a plea of guilty, have not been sentenced; that is not a matter for your concern; that will be disposed of by the proper officers of this court, but you can take that into consideration together with all the evidence of the witnesses that was presented here upon the witness stand, the demeanor of these defendants in their testimony, and determine, if you believe that they have been promised immunity or anything of that kind, will take that into consideration in weighing their testimony, but if from all of the circumstances as disclosed in this case by the witnesses you believe that should not be given any weight or emphasis, you will so disregard it; otherwise you will consider it in a way that you, as twelve honest, fair-minded men believe it should be considered.” (Trans. pages 90, 91).

To this instruction the plaintiffs in error duly excepted as follows:

MR. BELL: (Attorney for plaintiffs in error) “The defendants further except to the portion of the charge to the jury wherein Your Honor instructed them that the fact that the defendants who have plead guilty—that the fact that certain defendants who have testified in this case have plead guilty is no concern of the jury.” (Trans. page 91.)

IX.

The Court erred in denying the motion of the plaintiff in error Louie Ding for a new trial, made upon the following grounds:

(1) That said verdict is against and contrary to law. (2) That said verdict is against and contrary to the evidence. (3) Insufficiency of the evidence to justify the verdict. (4) Errors of law occurring during the trial, and excepted to at the time by the said defendants. (5) Erroneous instructions given to the jury by the trial judge, and particularly that part of the instructions wherein the trial judge instructed the jury that they would be justified in finding said defendants guilty if the evidence established beyond a reasonable doubt that the offense charged in the indictment had been committed any time within three years prior to the filing of said indictment." (Trans. pages 14 and 15.)

X.

The Court erred in denying the motion of the plaintiff in error Louie Lung Gin for a new trial made upon the following grounds:

(1) That said verdict is against and contrary to law. (2) That said verdict is against and contrary to the evidence. (3) Insufficiency of the evidence to

justify the verdict. (4) Errors of law occurring during the trial, and excepted to at the time by the said defendants. (5) Erroneous instructions given to the jury by the trial judge, and particularly that part of the instructions wherein the trial judge instructed the jury that they would be justified in finding said defendants guilty if the evidence established beyond a reasonable doubt that the offense charged in the indictment had been committed any time within three years prior to the filing of said indictment.” (Trans. pages 14, 15.)

XI.

The Court erred in sentencing the plaintiff in error Louie Ding to serve a term of two years’ imprisonment in the United States penitentiary at McNeil’s Island in the State of Washington, and to pay a fine of \$500.00.

XII.

The Court erred in sentencing the plaintiff in error Louie Lung Gin to serve a term of fifteen months’ imprisonment in the United States penitentiary at McNeil’s Island in the State of Washington.

ARGUMENT**FIRST**

The discussion in this subdivision will relate to the correctness of the court's instruction upon the subject of the defense of alibi and the time within which the jury was permitted to find the commission of the offense alleged. In the indictment the formation of the conspiracy was specifically fixed as the tenth day of December 1915, and the place as Seattle, in the Northern Division of the Western District of Washington. (Tr. pages 1 and 2.) In the opening statement of counsel for the Government it was stated that the conspiracy commenced in Seattle on the tenth of December 1915 and the first overt act in furtherance thereof was committed on the same date, and at the same place. (Trans. pages 23, 24.)

The witnesses for the Government fixed the time of the formation of the conspiracy alleged as between the fourth and tenth days of December 1915, and the place of its formation as Seattle, Washington. (Trans. pages 25 to 32.)

The evidence for the defense disclosed that the plaintiff in error Louie Ding left the City of Seattle of the ^{first} ~~third~~ day of December 1915 and did not re-arrived in the city of San Francisco on the evening

of the third day of December 1915 and did not return to the state of Washington until after the 25th of December 1915. (Trans. pages 33 to 49.)

The evidence for the defense disclosed further that the plaintiff in error Louie Lung Gin was absent from the city of Seattle and the State of Washington from October 15, 1915, until December 15, 1915. (Trans. pages 37 to 44.)

The evidence, therefore, clearly tendered and supported the defense of alibi.

As a general rule in criminal prosecutions, the exact time of the commission of the offense is not material so long as the evidence shows that it was committed within the period fixed by the statute of limitations applicable to the particular offense. To this general rule, there is one notable exception, and that is in cases where the defense of alibi is interposed and is supported by the evidence.

In such exceptional cases, the exact time becomes material and if the evidence of the prosecution fixes the time of the commission of the offense within a certain hour of the day or within any specified day, or within any specified period, and the evidence of the defendant shows or tends to show that he was not present during the hour of the day or the period fixed, but was in fact elsewhere, it is erroneous for the trial judge to instruct the jury to find

him guilty if they are satisfied beyond a reasonable doubt that he committed the offense charged at any time within the period fixed by the statute of limitations, and is prejudicial to the defense interposed. Indeed, such instruction under such conditions not only ignores but absolutely destroys the defense of alibi. This is the uniform holding of the courts.

In the case of *State vs. King*, 50 Wash. 312, at page 315, 97 Pac. 247, this question was considered and the rule here contended for announced as follows:

“The statement of the court that, ‘I will say in that connection that the exact date is immaterial. It does not make any difference so far as the crime is concerned if the defendant committed the crime as charged at any time within the period of three years prior to the time the information was filed,’ etc. was misleading and erroneous in the connection in which it was used. The witnesses for the state had fixed the date when the crime was committed as being between the 12th and 15th day of February 1907. The defense was that the defendant was not the person who obtained the money, and that he was sick at home, unable to leave his room between those dates. The time of the commission of the crime was therefore clearly material. There are many cases where no issue is based upon the time when the crime was committed. In such cases this instruction would be correct, but was misleading and erroneous in this case because the time was definitely fixed by the state, and the defense of an alibi was based upon that time.

It is difficult to imagine a case where the time of the commission of a crime is not material to the defense of alibi."

In a later case in the same court, *State vs. Moss*, 73 Wash. 430, 436, 131 Pac. 1132, it was said,

"The principle that the evidence may narrow the issue so as to make the exact time a material factor is announced in *State vs. King*, 50 Wash. 312, 97 Pac. 247. In that case the defendant was prosecuted for obtaining money under false pretenses. The defense was an alibi. The state's witnesses fixed the date of the crime as between the 12th and 15th of February. We held that the date of the commission of the crime was material, and that an instruction to the effect that the exact date was immaterial, and that it was sufficient if defendant committed the crime at any time within the period of three years before the filing of the information, was misleading and erroneous. So, also, in the case before us. The issue was narrowed so that the time became material."

In a still later case, *State vs. Morden*, 87 Wash. 472, 151 Pac. 832, the same question is discussed and the rule more fully stated,

"Among the instructions given by the court was one as follows:

"The court instructs you that the date stated is not one of the material allegations of the information which has to be proved as laid. It is sufficient if the state has shown that the crime charged was committed on or about the 30th day

of September, 1913, and within three years previous to the filing of the information in this case, which was on December 18, 1913.'

"The appellant contends that this instruction was fatally erroneous. As hereinbefore stated, the testimony introduced on behalf of the appellant was mainly directed to proof that the prosecuting witness was not present at the time and place testified to by her as the time and place when and where the alleged offense was committed. She testified to the effect that she thought the offense was committed on September 30, 1913; that she was not quite sure that it was September 30, but she was sure that it was on a Tuesday and on the day when the appellant's wife returned from a visit to Portland, where she had gone to place her daughters in school. The appellant, his wife, and several other witnesses all testified that Mrs. Morden returned from her visit to Portland between ten and eleven o'clock in the forenoon of Tuesday, September 30, 1913. It is, therefore, clear that, while the prosecuting witness was not certain as to the day of the month, she did fix the date of the crime as testified to by her, by her positive reference to the day Mrs. Morden returned, as the 30th day of September, 1913. There was, therefore, no dispute as to the exact date of the alleged offense. The evidence as to its commission was all to the effect that it occurred, if at all, on that certain day. Appellant's defense tending to show, by the testimony of several witnesses, that the prosecuting witness did not work for the appellant and was not present on his premises on that day, while not technically an attempt to prove an alibi, was very much of the

same nature. It was, in effect, an effort to prove an alibi of the prosecuting witness. She, by her own testimony, having definitely fixed the exact date when she charges that the crime was committed, this defense made the commission of the crime on that exact date the controlling issue in the case. The time charged was, therefore, as clearly material as it would have been had the defense been an alibi.

In *State vs. King*, 50 Wash. 312, 97 Pac. 247, the state's evidence fixed the date of the offense as between the 12th and 15th of a certain month. Upon the defense of an alibi, there was evidence that during that period the defendant was at home, sick in bed, and therefore could not have committed the offense. In that case, this court held an instruction, to the effect that the exact date was immaterial and that it was sufficient if the defendant committed the crime at any time within three years prior to the time the information was filed, constituted misleading error. We said: 'It is difficult to imagine a case where the time of the commission of a crime is not material to the defense of alibi.' In all reason, as it seems to us, it is just as difficult to imagine a case where the defense is that the victim of a personal assault was not present at the time and place when the assault must have been committed, if at all, in which the time of the commission of the offense would not be material to such a defense. While under the statute Rem. & Bal. Code, Sec. 2060 (P. C. 135 Sec. 1025), it is not essential that the precise time of the offense charged be alleged in the indictment or information, the question here presented is not one of allegation, but of proof and of the necessity for

an instruction applicable to the proof. The instruction complained of was erroneous. It withdrew from the jury the appellant's chief defense."

See also, to the same effect,

People vs. Morris, (Cal.) 84 Pac. 463.

In the present case the place of the formation of the alleged conspiracy was fixed at Seattle and the time fixed as between the fourth and tenth days of December, 1915. The evidence of the defense established that the plaintiffs in error were absent from the State of Washington during that period. The trial judge instructed the jury that the exact time of the formation of the conspiracy was immaterial, provided they found from the evidence that it was formed at any time within three years prior to the returning of the indictment. The effect of this instruction was to exclude the defense of alibi from the consideration of the jury and was clearly erroneous and prejudicial.

SECOND

The second assignment of error calls in question the action of the trial judge in admitting over the objection of the plaintiffs in error some 150 tins of opium. Plaintiffs in error were not charged in the indictment with the illegal importation of opium or with the formation of a conspiracy to do so. The

bringing in of this opium was a separate and independent transaction and was in no wise connected with the conspiracy charged in the indictment and the admission of this evidence was highly prejudicial to the plaintiffs in error. They, as well as most of the other defendants charged as conspirators, were Chinese. In view of the popular impression that all Chinese handle and most Chinese use opium, the admission of this evidence was bound to inflame and prejudice the minds of the jurors against the plaintiffs in error and confuse their minds as to the real issue submitted for their determination.

In the case of *Boyd vs. United States*, 142 U. S. 450 on the trial of a person indicted for murder, it appeared in evidence that the killing followed an attempt to rob. The court admitted, over objections, evidence tending to show that the prisoner had committed other robberies in the neighborhood on different days, shortly before the time when the killing took place and it was held that this evidence was inadmissible and prevented the defendant having a fair trial. In discussing this question, the court uses the following language, at page 457:

“If the evidence as to crimes committed by the defendants, other than the murder of Dansby, had been limited to the robberies of Rigsby and Taylor, it may be, in view of the peculiar circumstances disclosed by the record, and the specific directions by the court as to the pur-

pose for which the proof of those two robberies might be considered, that the judgment would not be disturbed, although that proof, in the multiplied details of the facts connected with the Rigsby and Taylor robberies, went beyond the objects for which it was allowed by the court. But we are constrained to hold that the evidence as to the Brinson, Mode and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and the injury done the defendants in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however

full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.”

In the case of *State vs. Pryor*, 67 Wash. 216, 121 Pac. 56, evidence of other crimes not connected with the crime charged in the information was introduced and after its introduction into the case was stricken by the trial court, and the jury cautioned to disregard it, and notwithstanding this action of the court, the appellate tribunal held that it was impossible to remove from the minds of the jurors the prejudicial effect of the improper testimony and reversed the case for a new trial. We quote briefly from the opinion:

“On cross-examination of the defendant, the state’s attorney, notwithstanding the fact that the evidence had been stricken, questioned him concerning the alleged acts of sodomy. This was highly improper. While the court sustained an objection thereto, and instructed the jury to disregard this, its tendency was to keep before the minds of the jury the stricken evidence.

“These errors were so vital, and the effect of the incompetent evidence, from its very nature, so prejudicial, that we cannot say that they were cured by the order to strike, and the instruction to disregard. If the testimony of the prosecuting witness as to the other two crimes not charged in the information was believed, it would inevitably create a prejudice in the mind of any human being not lower in his moral

makeup than the beasts of the field. We have no assurance that the jury did not believe it. It would be to the credit of the jury, rather than to its discredit, if, believing this testimony, it entertained a prejudice against the accused, ineradicable by any order striking the testimony, or by any instruction, however clear and forcible, to disregard it. A fair trial consists not alone in an observance of the naked forms of law, but in a recognition and a just application of its principles. It may be that the defendant is guilty. On that we express no opinion. It must be remembered, however, that 'though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community'. *Hurd vs. People*, 25 Mich. 404."

THIRD

Under this subdivision we will discuss briefly assignments of error three and five. These assignments involve the action of the trial court in refusing to direct a verdict of acquittal in favor of the plaintiff in error Louie Lung Gin.

The evidence for the Government failed to disclose that this plaintiff in error ever knew of the existence of the alleged conspiracy or of its purpose, or that he ever, with knowledge of its existence and purpose, aided, abetted or participated therein. So far as he is concerned the evidence shows simply that he was the nephew of Louie Ding, a codefendant,

that on the night of the arrival of the alien Chinese in the city of Seattle, Lortie, an admitted conspirator found him at the flat on Main Street, originally designated by another alleged co-conspirator as the place of the delivery of the aliens, and that he was seen in the neighborhood of the dock at the foot of Harrison Street in the city of Seattle under which the alien Chinese were secreted after their arrival.

It is elementary that for the crime of conspiracy, or other criminal offenses, no person should be convicted upon mere suspicion, or because he may have had an opportunity to commit the crime charged, or upon circumstantial evidence unless the circumstances are so connected and of such a character as to exclude every hypothesis save that of guilt.

In addition to the lack of proof as to the knowledge of the existence and participation in the unlawful conspiracy, the conspiracy had been consummated by the landing of the alien Chinese in the City of Seattle before any knowledge of the plan and purpose of the conspirators had been brought home to the plaintiff in error Louie Lung Gin. This being the condition of the evidence at the close of the Government's case it was error on the part of the trial judge to refuse to direct a verdict of acquittal in his favor.

FOURTH

Under this subdivision, we will discuss the instruction given by the trial judge upon the subject of reasonable doubt, which is set forth verbatim in the assignment of errors herein, ante page ...14.....

Chief Justice Shaw in an early Massachusetts case, *Commonwealth vs. Webster*, 5 Cush. 320, said that the term reasonable doubt is a term often used, probably pretty well understood, but not easily defined. The difficulty of defining it with precision seems to exist at the present time, if the number of appeals involving the instructions on this subject is any criterion. Whatever may be said in favor of or against the various definitions given by trial judges from time to time upon this subject, all authorities seem to agree uniformly that it is improper and erroneous to state to a jury in a charge upon this subject that a reasonable doubt is such a doubt as the jurors are able to give a reason for.

It would seem clear that a juror might entertain a reasonable doubt as to the guilt of the defendant based upon the evidence, without being able to give a reason therefor, either sound or indifferent. His inability to furnish a reason or reasons for his doubt to his fellow jurors ought not to deprive the defendant of the benefit of that doubt.

In the present case the trial judge told the jury in unmistakable terms that a reasonable doubt is one for which they should be able to give a reason. This was erroneous, misleading and prejudicial.

A similar instruction was before the appellate court in the case of *State vs. Cowen*, 108 Ia. 208, 78 N. W. 857, and it was there held to be erroneous and prejudicial to the rights of the defendant. The language of the court is as follows:

“Nor can we approve the fifth instruction as a safe definition of ‘reasonable doubt’: ‘By a “reasonable doubt,” as herein instructed, is meant a doubt such as a reasonable man might entertain, after a careful review of all the evidence in the case, as to the guilt of the defendant. In a legal sense, a reasonable doubt is one which has some reason for its basis. It does not mean a doubt from mere caprice or groundless conjecture. A reasonable doubt is such a doubt as the jury are able to give a reason for.’ The last clause is the one to which exception is taken. Who shall determine whether able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case ex-

cluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.”

In *Siberry vs. State*, 133 Ind. 677, 33 N. E. 681, an instruction similar to that given by the trial judge in the present case is criticised in the following language:

“Again, in the fifty-fifth instruction, the jury is told that a ‘reasonable doubt is such a doubt as the jury are able to give a reason for.’ The term ‘reasonable doubt’ would seem to imply a doubt for which there was a reason, but, when analyzed and considered in the connection in which it is used in a criminal case, it seems to us that this definition is erroneous and misleading. It is possible that the term ‘beyond a reasonable doubt,’ which has crept into the criminal law as expressing the degree of certainty with which the guilt of the accused shall be proven to justify a conviction, is not as comprehensive as some other language would be; that the term, of itself, is uncertain. We have a doubt in relation to things about which we can give no reason, and of which we have imperfect knowledge. It is the want of sufficient knowledge in relation to the facts constituting the guilt of the accused that causes the juror to doubt. It is the want of information and knowledge that creates the doubt. This court has said, in effect, that to justify a conviction the evidence must satisfy such juror of the guilt of the accused with such a degree of certainty as he would not hesitate to act in matters of the highest importance to himself, affecting his dearest and nearest inter-

ests, under circumstances where he was not compelled to act but was free to act or not, as he deemed proper. It is the lack of information and knowledge satisfying the members of the jury of the guilt of the accused with that degree of certainty required by the law which constitutes a reasonable doubt, and if jurors are not satisfied of the guilt of the accused with such degree of certainty as the law requires, they must acquit, whether they are able to give a reason why they are not satisfied to that degree of certainty or not. The burden is on the state to furnish each juror such information as, that he, acting under oath, is so convinced of the defendant's guilt that he would not hesitate to act upon his convictions of the guilt of the defendant in relation to matters involving his most important affairs, affecting his dearest and nearest interests. In the case of *Wall vs. State*, 51 Ind. 453, 465, this court said:

‘Many learned judges have endeavored to define a reasonable doubt, but perhaps it is not susceptible of a clearer definition than that expressed in the plain words “reasonable doubt,” for it is doubt which is cognizable by the reason, and dwells in the understanding, as distinguished from a doubt which is raised by fear, hope, love, hatred, fancy, feeling, prejudice, interest, or some of the motives which sway our natures, and which flit through the emotions instead of resting in the mind.’

A juror is presumed to act honestly, under the solemnity of his oath, with a view of reaching a correct conclusion as to the guilt or innocence of the accused. When he has done so he is not satisfied of his guilt with that certainty

which would cause him to act unhesitatingly in matters of the highest importance to himself, affecting his dearest interests; and in such case the law says he shall not convict, because the proof is not sufficient to satisfy the mind of the juror with that certainty upon which alone he shall convict. When this state of mind exists, the juror has what is termed in the law a 'reasonable doubt' of the guilt of the accused, though the juror may not be able to give a reason for such a doubt, except he might say the evidence is not sufficient to satisfy one of the guilt of the accused with the certainty required by the law; but that is no reason for the doubt. It is but a reason why the accused should not be convicted. Such an instruction as the one we are considering can, we think, only lead to confusion, and to the detriment of the defendant. A juror may say he does not believe the defendant is guilty of the crime with which he is charged. Another juror answers that you have a reasonable doubt of the defendant's guilt; give a reason for your doubt; and under the instruction given in this cause the defendant should be found guilty unless every juror is able to give an affirmative reason why he has a reasonable doubt of the defendant's guilt. It puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt with the certainty which the law requires before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case."

To the same effect, see also:

Ray vs. State, 50 Ala. 104;

Cowan vs. State, 22 Neb. 519, 35 N. W. 405;

Carr vs. State, 23 Nebr. 749;
State vs. Sauer, 38 Minn. 438;
Morgan vs. State, 48 Ohio St. 371; 27 N. E.
710.

FIFTH

Under this subdivision we will discuss the instruction noted in the assignments of errors, ante page 15....., wherein the trial judge told the jury that they were not concerned with the fact that certain of the defendants charged in the indictment as co-conspirators had pleaded guilty but had not been sentenced and that this fact was not a matter for their concern. This was clearly erroneous.

The fact that these defendants had pleaded guilty to the indictment charging the general conspiracy, and sentence upon them was being held in abeyance so that their testimony could be used to bring about the conviction of the plaintiffs in error was a matter of the highest concern to the jury, and was a fact which they were entitled to consider for the purpose of determining the weight and credibility to be attached to their testimony. It was a matter also of concern to the jury in reference to those witnesses whether they had been expressly promised immunity or whether it was tacitly understood between the prosecuting officers and these defendants that immunity would be extended to them.

It was also a matter of the highest concern to the jury that these defendants were admitted accomplices in the commission of the alleged conspiracy. Instead of being told that they were not concerned with the fact that they had pleaded guilty, the jury should have been instructed that this evidence came from a corrupt and polluted source and that they would not be justified in returning a verdict upon such testimony unless it was corroborated by other disinterested and credible testimony. Such is the recognized doctrine of the Federal courts.

United States vs. Lancaster, 44 Fed. 921;

United States vs. Logan, 45 Fed. 890;

United States vs. Howell, 56 Fed. 39;

United States vs. Hinz, 35 Fed. 272;

Commonwealth vs. Holmes, 127 Mass. 424;

2 McClain, Criminal Law, Sec. 990.

SIXTH

The other assignments of error, notably nine, ten, eleven and twelve are covered by the discussion in the preceeding subdivisions, and consequently nothing additional need be urged here with special reference to them.

In conclusion we submit that by reason of the errors assigned and presented, this cause should be reversed with instructions to the trial court to dis-

miss the action as to the plaintiff in error Louie Lung Gin or, failing this, that the trial court be directed to grant a new trial herein to said plaintiff in error, and that as to the plaintiff in error Louie Ding the trial court be directed to grant a new trial herein.

Respectfully submitted,

WALTER S. FULTON,
Attorney for Plaintiffs in Error

WILLIAM R. BELL,
Attorney for Plaintiffs in Error

No. 2953

IN THE
**United States Circuit Court
of Appeals**
For the Ninth Circuit

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Plaintiffs in Error,
vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN
DIVISION.

HON. JEREMIAH NETERER, *Judge.*

Brief of Defendant in Error

CLAY ALLEN,
United States Attorney.

WINTER S. MARTIN,
Assistant U. S. Attorney.

310 Federal Building,
Seattle, Washington.



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STATEMENT OF THE CASE.

Counsel for plaintiffs in error have made an accurate but somewhat incomplete statement of the case. It is particularly important that the court have before it a detailed narrative of the case, in view of the fact that it will be heard by stipulation upon a much abbreviated printed record.

The bill of exceptions filed in the case and a part of the unprinted record in this court contains a full statement of all the evidence and will bear out the statements made by defendant in error to supplement the statement of the case furnished by plaintiffs in error.

First, it should be noted that Louie Ding, according to Lortie's testimony, was the proprietor of a gambling house at 666 King Street, in Seattle, in a part of the premises of the Milwaukee Hotel building. In the fall of 1915 two or three months before the conspiracy of December, Lortie was introduced to one Lim Jim, a Vancouver Chinese, by Louie Ding. The introduction and meeting took place in Louie Ding's place of business in the Milwaukee Hotel on King Street. During the conversation between Lortie, Ding and Lim Jim, it was agreed that Lortie should bring opium from Vancouver, B. C., to Seattle for the joint account of Lim Jim and Louie Ding. Jim was to furnish the opium and Lortie was to receive two dollars per tin for bringing it into the United States. Lim Jim was then the manager of the Jim Lee Yuen Com-

pany of Chinese, which had its place of business at 565 Carrol Street, Vancouver, B. C. The business telephone of the Jim Lee Yuen Company at its Carrol Street address was Seymour 899. Lim Jim's residence phone at 1761 Grant Street was Highland 884. These addresses and telephone numbers remained the same during the fall of 1915 up to the time when Lortie and his white companions went to Vancouver and procured the fourteen Chinese.

Louie Ding, as early as 1912, was the manager of the Quong Lee Company, which had its place of business at 666 King Street, in the Milwaukee Hotel building, as appears from an electric light contract signed by Ding, as Quong Lee Company, by Louis Ding, Manager. (See testimony of Miles Bright, Bill of Exceptions, p. 199, and pages 236 to 242; also that of Charles G. Meyers.) His signature to the contract was proven and it was further shown that he continued at the same place of business down to and including the period of the conspiracy in December, 1915. The Quong Lee Company, of which Ding was manager, had for its business phone in Seattle the number Main 5452. The evidence showed

that in the latter part of November, 1915, two telephone conversations were held over the telephone Main 5452 at Louie Ding's place of business, 666 King Street, to the Vancouver telephones of Lim Jim and the Jim Lee Yuen Company in Vancouver, B. C., connecting with the numbers Seymour 899 and Highland 884.

This has certain significance when it later appears that Worthington, in Vancouver, met another Chinese by name of Louis whom he had previously known at the Jim Lee Yuen Company store on Carrol Street, to whom he delivered his letters and with whom he arranged for the fourteen Chinese to come on board the launch the next evening. Lortie, upon arrival in Vancouver, went to see this same Lim Jim and received two suitcases of opium, which he carried to the launch and which were afterwards taken to Seattle with the Chinese. Lim Jim and the Jim Lee Yuen Company were actively conspiring on the Vancouver end of the conspiracy to co-operate with Lortie and Ding in Seattle. The evidence discloses that Ding was the principal at Seattle, Lortie the agent and go-between and Lim Jim the co-conspira-

tor at Vancouver who furnished Chinese and opium.

Louie Lung Gin is Louie Ding's nephew and, according to the government evidence, was employed by Louie Ding at his place of business, 666 King Street. He had access to the flat, 1037 Main Street, and was in Seattle working for Ding when the conspiracy charged in the indictment was planned. China Dan, one of the conspirators, rented the flat, 1037 Main Street, in October, 1915. Lortie talked with Louie Ding in this flat about a week before going to Vancouver on the smuggling journey. Ding told him he would not be there, because he, Ding, was going to California, but that he, Lortie, should deliver the smuggled Chinese at the flat, 1037 Main Street, upon his return to Seattle. Lortie, after seeing the Chinese and opium safely on board the launch at Vancouver, returned to Seattle by railroad train. When Worthington and Miller arrived on the launch at Seattle with the Chinese, Lortie, after receiving a telephone call apprising him of the arrival, phoned for Lung Gin and agreed to meet him and Dan a few minutes later at the flat, 1037

Main Street. Pursuant thereto the meeting was held, Dan, Lortie and Lung Gin being present. Counsel says he took no part in the meeting, but the evidence at page 74 of the printed transcript affords a different version of what took place. The arrival of the Chinese, the danger of arrest and the best method of disposing of the Chinese were discussed between them. The evidence further showed that the Chinese were brought to the launch in the darkness at Vancouver and were put on board the launch. It further shows that no effort was made to present the Chinese to the immigration officers at Seattle for examination, but on the contrary they were landed under an old dock in the darkness. Lung Gin went with one Ito in an automobile to the dock to get them and take them back to Chinatown. When the officers made the arrest Lung Gin escaped in the darkness and fled to Portland. Some of the Chinese, on cross-examination, admitted they were laborers, and all of them made statements at the time of their arrest showing conclusively that they belonged to the excluded class of Chinese. The government's testimony showed that Louis Lung Gin worked in Seattle during the fall of 1915, and

remained until about Christmas time. During that period he contracted a small grocery bill in a Japanese grocery on Jackson Street. When Lung Gin, who was known by the name of Henry, left Seattle, he took with him an envelope with the Seattle address of the proprietor of the Japanese grocery referred to, in her own handwriting, viz., that of one Mrs. Hirati. Later, about the first of the year, she procured one Sammy Brown, a little colored boy, to write her a letter to Lung Gin at his Portland address. When Lung Gin was arrested in Portland, the letter written by the colored boy, together with the envelope addressed by Mrs. Hirati to herself in Seattle in her handwriting, were found on his person, all of which tended to disprove the alibi testimony of Lung Gin. When arrested in Portland, Lung Gin said he had not been in Seattle since early in the summer before, when he went there to collect a bill.

There was testimony by the government officers who arrested defendant Ding in Portland to the effect that he denied his identity and only admitted it when confronted with letters found on his person

addressed to him under the name of Louie Ding. There was evidence by one Bayne that Ding was seen by him in Seattle later than December first. The defense evidence of alibi was also contradictory as to Ding. Some of the Chinese who testified for the defense placed him in Portland, Oregon, on December 16th, while others had him in San Francisco on that date. There were other discrepancies in the alibi testimony, but as the error complained of on this point goes only to the court's instructions it will not be necessary to comment upon them.

FIRST.

Plaintiff in error complains of the court's instruction touching the time of the commission of the offense in view of the defense of alibi. He contends that the defense of alibi having been interposed, time so far becomes the essence of the offense as to require proof of the same to correspond and coincide with the allegation of the indictment with respect to the time alleged.

In our view of the law, the usual and customary instruction as to the defense of alibi has no application to the crime of conspiracy.

It has been urged many times that alibi is a special plea or an affirmative defense, which, having been interposed, must be treated as a thing apart from the direct case against the defendant, instead of a mere fact among all of the other facts of the case introduced by defendant, which may weaken or rebut the state's case against him.

Adopting this erroneous premise, one can easily reason that the defense of alibi once interposed subordinates every other consideration in the case to the one claim of the defendant, that he was elsewhere, without regard to the crime charged or the relation of this denial of fact to the other facts in the state's case. We say, denial of fact, for by the weight of authority, alibi is not a special plea or affirmative defense, but rather a negation touching a material allegation of the indictment, viz.: that he "then and there" committed the offense set out therein. By this same weight of authority, if the proof offered by defendant in a criminal defense, that he was "elsewhere" is sufficiently strong to cause the jurors to have a reasonable doubt upon the whole case presented, then it is their duty to

acquit. It is only necessary that the defendant offer enough evidence that he was elsewhere to create reasonable doubt as to his presence in the commission of the crime.

Dealing then with the physical fact of defendant's presence as a component part of the charge against him, that he committed the offense, it becomes immaterial in a case wherein the physical presence was not necessary to the commission of the offense as in instigated crimes and in conspiracies. In other words, alibi or its English equivalent of "elsewhere" is a very literal defense, or, more properly, "denial," which only applies to those crimes which require the personal presence of the accused in their commission.

This view of the law is sustained by the text in Wharton's Criminal Evidence, 10th Ed., p. 676. Doctor Wharton says:

"Where the prosecution establishes a conspiracy on the part of two or more persons to do any unlawful act, an alibi cannot be shown in defense, as, in conspiracy, the presence or absence of one of the conspirators at the exact time or the time covered by the offense is im-

material, and an instruction on the defense of alibi would be misleading."

This view of the law had been adopted by the Texas Court of Criminal Appeals in the following cases:

Jenkins vs. State, 75 S. W. 312.

Cain vs. State, 59 S. W. 275.

And by the Supreme Court of Missouri in

State vs. Gatlin, 70 S. W. 885.

Glover vs. U. S., 147 Fed. 426, reviews the modern authorities dealing with alibi and sustains the general observations of the writer, although the precise point raised by counsel at bar is not discussed.

The recent cases of

Hyde vs. United States and *Brown vs. Elliott*,
225 U. S. 347, and 392,

establish the rule that the place where the conspiracy was entered into need not be alleged in the indictment. Men may conspire, although they never meet and never were in the state where the venue is laid and where the overt act was committed by one of the conspirators, and the time when the con-

spiracy was formed is relatively unimportant if the defendant remained in it down to the commission of the overt act. This even overcomes the statute of limitations where the proof shows the conspiracy commenced long before the three-year period, but continued into the three-year period followed by the commission of the overt act within the said period of limitations.

Alibi as applied to a conspiracy under federal law would only be important as applied to an overt act which actually required the physical presence of defendant for its commission. In the instant case the alibi touches the formation of the conspiracy. The issuable fact is, Was such a conspiracy formed? It is immaterial whether formed December first or November first, and equally immaterial whether in Vancouver or Seattle. The inquiry is, Was it formed? The proof shows co-operation, criminal intimacy, guilty knowledge and preparation in the interview in the early fall in Louie Ding's place of business between Lim Jim of Vancouver, Louie Ding, and Lortie of Seattle. True, the subject of the first conversation was opium, but it af-

fords excellent ground work for the conspiracy and the overt acts which followed. Lortie says Ding told him that he, Ding, would not be there when he returned with the Chinese, but to deliver them at the flat.

With these general considerations in mind, let us look into the instruction complained of: The court said in his first instruction before the exception was taken:

“Now, you are instructed that if the defendant Ding was not here at the time that the conspiracy was entered into, of course, he would not, and did not become a member of it afterwards, and, of course, he could not be held in this indictment.”

When the court's attention was called to this instruction, he in substance told the jury that they should consider all the evidence in the case, both of the government and the defense, with relation to the time in question, and then conclude whether it was inconsistent with the government's case.

They were, in substance, told to look at all of the evidence relative to the formation of the conspiracy and to conclude then whether there was

anything in Ding's evidence which was inconsistent with the government's claim that he had entered into a conspiracy with the other defendants in the case.

Counsel's argument proceeds upon the assumption that it was not only necessary that Ding be physically present, but that the time the conspiracy was planned and entered into is so definitely laid by the government's proof as occurring a week before the journey to Vancouver for Chinese that Ding's testimony that he left Seattle the first of December, or three days earlier than the time mentioned by Lortie, furnishes such a complete defense that if the jury had been properly instructed his client would undoubtedly have been acquitted.

Counsel states at pages 18 and 24 of his brief that the conspiracy was definitely laid by the government's testimony as commencing between the fourth and tenth of December, 1915. The evidence does not sustain such a definite and arbitrary statement. Lortie makes a statement in two different places in the transcript, viz., page 25 and page 69, where he was asked when a certain conversation took place between himself and Louie Ding, and

he answered in each instance, "*Oh, about a week before we started.*" This interview took place at the flat, 1037 Main Street, and during the conversation Lortie received his letters to be delivered to the Vancouver Chinese. "About a week" may mean a few days more or less than a week.

When Lortie was asked when he received the letters for the delivery of the Chinese he replied that he could not remember the date. (Transcript, pp. 25-26.)

Worthington met Lortie on Friday evening, December 9th, and Lortie, Worthington and Miller left Seattle, Saturday, December 10th. The proof shows conclusively that the Chinese were brought to Seattle on the launch *Blanche W.*, where they landed on the night of December 16th, 1915, and the meeting in the flat between Ding and Lortie is fixed by Lortie as "about a week" before the 10th of December, which may easily mean that it occurred as early as November 30th, or as late as December 6th or 7th. All the jury could do was to determine whether Lortie was telling the truth when he said that he met Ding in the flat at 1037 Main Street

and received the letters for the Chinese, together with the direction to take them to the flat on arrival in Seattle. Bear in mind also that Louie Ding told Lortie that he (Louie Ding) was going to California and would not be there when he got back with the Chinese, but that he should deliver them at the flat. (See page 178 of Transcript.) This testimony can easily be reconciled with that of Ding wherein he claims to have left Seattle as early as December first. The phrase "about a week" is easily elastic enough to meet the Ding assertion that he left for San Francisco on the first, particularly when you consider Lortie's further statement that Ding told him he would not be there when Lortie got back and to deliver the Chinese at the flat.

Counsel's argument rests entirely upon the one statement of Lortie as to the meeting between himself and Ding wherein the particular details of the conspiracy were planned. It makes no mention of the interview between Lim Jim, Ding and Lortie early in the fall. It disregards the mysterious phone calls to Lim Jim in Vancouver over Ding's Seattle phone in November. It disregards

the active part played by Lim Jim in Vancouver in furnishing the Chinese and opium for smuggling purposes, two commodities which cannot be procured without human preparation and co-operation. The indictment charges the defendants as conspiring together and with others unknown to the grand jury. Lim Jim was clearly an unknown co-conspirator in Vancouver without whose co-operation or that of some other person performing the same part of the conspiracy was not possible of consummation or successful completion.

SECOND.

The second assignment of error relates to 150 tins of opium which were brought to Seattle on the launch, together with the fourteen smuggled Chinese. It is contended that the admission of this testimony was improper because the act of bringing the opium into the United States constituted a crime other than that charged in the indictment. It is claimed by the plaintiffs in error that the admission of this evidence was highly prejudicial to the defendants and that it constituted prejudicial error. This evidence relating to the 150 tins of opium is so

inevitably a part of the case as to make the same proper as part of the *res gestae*.

In the opening statement we called the court's attention to the intimate relations existing between Lortie, Lim Jim and Louie Ding for the purpose of throwing light upon what happened subsequently. The court will remember that Lim Jim was the manager of the Jim Lee Yuen Company of Chinese, of 565 Carrol Street, Vancouver; that he visited Louie Ding at his place of business on King Street two or three months before the conspiracy of December, 1915; that during his visit with Ding, Lortie appeared and was introduced to him, and a conversation followed, in which it was arranged that Lortie should go to Vancouver, obtain opium from Lim Jim and bring the same to Seattle for \$2.00 per can, for the joint account of Louie Ding and Lim Jim. While this conversation related to opium, yet it showed the criminal purpose common to each, and a criminal intimacy which throws light upon the offense charged in the indictment when it is recalled that Lortie procured from Louie Ding two Chinese letters which were delivered to Lim Jim and

to one Louie of the Jim Lee Yuen Company in Vancouver. These letters of direction made it possible for Lortie to secure his Chinese. He could not have done so without having the confidence and co-operation of Lim Jim and the Chinese letters of Louie Ding to turn over the Chinese to him when he presented them to Lim Jim in Vancouver.

The evidence discloses that two long distance telephone calls were had over the telephone line between Seattle and Vancouver, B. C., the call going out of Louie Ding's place of business on King Street, to Lim Jim in Vancouver, one to his residence phone, the other to the business phone of the Jim Lee Yuen Company on Carrol Street. No objection was made by counsel to this testimony, and it was clearly competent for the purpose of showing the relation of the parties, and guilty knowledge. It tended directly to supplement the material allegations of the indictment relating to the conspiracy to import Chinese into the United States in December, in violation of law.

Then when we come to the details of the trip, we find that Worthington and Miller looked after

the Chinese and made arrangements for them to go on board the following evening. Lortie at the same time saw his friend Lim Jim and procured from him 150 five-tael tins of opium, and this was placed on board the launch with the Chinese and brought to Seattle. The opium was landed with the Chinese at Harrison Street, and was handed from one to another from the place beneath the dock to its place in the automobile where it was discovered when the arrest was made.

Lortie was not arrested with the Chinese, nor were the other two white men, Miller and Worthington nor was Lung Gin. The fourteen Chinese, together with Ito and the opium were seized in the automobile. Louie Ding and Lung Gin were arrested in Portland, Oregon, Lortie was afterwards picked up in Seattle together with Miller and Worthington. The indictment lay against all of these defendants, charging them with conspiracy to bring in Chinese. The two suit cases of opium together with the circumstances under which they were obtained by Lortie became an inseparable part of the conspiracy and tended to show more clearly a con-

nection between Louie Ding, Lim Jim, Lortie and his associates.

A reference to the record discloses that repeated reference was made to the 150 tins of opium without objection on the part of Counsel MacMahon, who tried the case in the lower court. The two suit cases of opium need never have been admitted for that matter so far as the government's case goes; for the government's purpose was accomplished when without objection the part the opium played in the transaction was admitted in evidence.

Lortie testified at page 53 of the transcript that when he went ashore he went to Lim Jim's residence on Grant Street. On page 55 Lortie was asked what, if anything, he said or did at Lim Jim's residence on Grant Street, and he replied as follows:

“A. I made an agreement with him to get some opium.

Q. What was said concerning the opium; what was the agreement?

A. The agreement I was to be at the Kit-silano Dock and it would be delivered there to me.

Q. How much opium was to be delivered to you?

A. I think it was 150 or 155 pieces.

Q. How much was to be paid you, if anything, for the delivery and transportation of this opium?

A. Two dollars apiece.

Q. Two dollars a tin?

A. Yes, sir * * *.

Q. Tell me what was done after that; what you did, and what they all did.

A. I waited for the opium and a Chinaman came down to the dock and delivered the opium to me and I put it on the boat.

Q. How was the opium delivered—in what form?

A. In suit cases.

Q. Two suit cases?

A. Yes, sir.” (Transcript, pp. 55-56. Bill of exceptions, pp. 27, 28, 29-30.)

Again Mr. Lortie was asked (Bill of Exceptions, p. 45) to look at the two suit cases for purposes of identification. These questions and answers are as follows:

“Q. And were the suit cases that you referred to as being put on your boat?

A. Yes, sir.

Q. Containing the seventy-five tins of opium each?

A. Yes, sir.

Q. In your judgment are these the cases?

A. I believe they are." (Transcript, p. 56.)

At which point the two suit cases were offered for identification as Plaintiff's Exhibits III and IV.

At page 85 of the Bill of Exceptions, Mr. MacMahon, counsel at the trial, put these questions to the witness, Lortie:

"Q. Then during all the time you described—I will make this general question to save a lot of cross-examination concerning Vancouver—all the time you were in Vancouver receiving, handling and transporting Chinese, opium, suit cases and other things you never saw Louie Ding, the Chinaman? (Transcript, p. 56.)

Lortie answered:

"A. I never saw Louie Ding." (Transcript, p. 57.)

And counsel not being satisfied with his reply, put the question a second time to him as follows:

"Q. I say during all the time you were in Vancouver to which you have testified on this particular trip, when you were delivering this

letter in Vancouver, receiving as you said two suit cases full of opium and the fourteen Chinese boys—taking them off the street car, putting them on your launch and leaving the dock and going away, did you see Louie Ding in Vancouver throughout your entire transaction?

A. No, sir.” (Transcript, p. 57.)

Following this evidence upon redirect examination, Lortie was asked concerning his meeting with Lim Jim and a statement he had made in cross-examination for the purpose of explaining his connection with Lim Jim. In the questions and answers which follow he was asked about Lim Jim and without objection stated that he had an interview with him in Louie Ding’s place a few months before the December trip. He was asked this question:

“Q. What was said by Ding, Lim Jim or yourself upon that occasion?

A. There was an agreement made to go and get some opium for Louie Ding.

Q. Give us the entire conversation; tell me everything that was said.

MR. MACMAHON: I object if it was prior to the first date fixed in the indictment. The court

has already ruled I cannot ask him concerning it.

MR. MARTIN: Your cross-examination made it material.

THE COURT: Overruled.

MR. MACMAHON: Exception.

THE COURT: Noted.

Q. State the entire conversation on that occasion.

A. Louie Ding introduced me to him, and he told me that he was a wealthy Chinaman in Vancouver and he told me he wanted me to bring him some opium, and I went over and saw Louie Ding—or I met Jim Lim—Lim Jim I met in Vancouver.

Q. On the trip in question?

A. Yes, sir.

Q. The trip you have testified to in December?

A. The agreement I was to go and get this opium from Lim Jim. (Transcript, p. 58.)

Q. How much were you to receive for getting the opium or for the opium?

A. I was to receive two dollars from this man when I got there.

Q. Two dollars for what?

A. Apiece.

Q. Apiece—what do you mean apiece?

A. A can.

Q. Per can?

A. Yes, sir.” (Transcript, p. 59.)

And on page 60 of the Transcript, Lortie said:

“A. He told me to go over and get this opium and the next time he probably would give me more.” (Transcript, p. 60.)

In the testimony of Melvin B. Miller, one of Lortie’s white associates, he was asked:

“Q. Was anything said about getting any opium in Vancouver?

A. Yes, sir.

Q. By whom and when?

A. Mr. Lortie.

Q. During the trip.

A. Yes, sir.

Q. What was said about the opium?

A. Just said he didn’t know how much he would get, but he would get some.

Q. Do you know how much Lortie was to receive for bringing the opium in?

A. He told me two dollars a tael * * *.

Q. How many Chinese came to the boat?

A. Fourteen." (Transcript, p. 61.)

In Worthington's testimony he was asked the question, "What did Lortie say to you," referring to the evening of the 9th of December when Lortie sought Worthington for the purpose of getting him to go on the trip, at Worthington's home. He answered:

"A. He wanted me to go to Vancouver with him.

Q. For what purpose?

A. To get a load of Chinese and some opium * * *." (Transcript p. 63.)

And throughout his testimony repeated reference was made, without objection, to the suit cases and their contents. Repeated questions were put to Worthington as to whether he had counted the tins of opium and as to whether or not they were the same tins which were in the suit cases in court, and a number of other questions of similar import. During the examination of these three witnesses, the entire transaction relating to the arrangement between Lim Jim, Lortie and Ding when the opium subject was first broached in Ding's place of business

on King Street a few months before the December trip, down to and including all of the details relating to procuring the Chinese and opium and bringing them to Seattle, was discussed by the witnesses and every angle of the opium testimony related to the jury. No objection was raised or suggested on the part of Mr. MacMahon, who tried the case in the lower court. From all that appears in the record he may have been as anxious as the government to have the opium incident explained and amplified.

It was the contention of the defendants all the way through the case that so far as Louis Ding and Louie Lung Gin were concerned, that they were not in the city at the time the conspiracy was formed, that they never entered into and took no part in it. From all that appears in the record up to the time the objection was made, it might easily have been counsel's purpose to make Lortie and his white associates appear to be guilty of smuggling of every character. He may have wished to make Lortie out as bad as possible and to charge him with being the principal in the enterprise, who was conducting a wholesale smuggling business in Chinese and opium,

At the end of all of the white men's testimony he offers the one unexplained objection.

The government could very well have closed the plaintiffs' case without offering the two suit cases and their contents. The prosecution had shown the criminal intimacy of the parties together with a statement covering all of the details of the crime.

Counsel for the government anticipating objection to the evidence relating to the opium was prepared to ask that the jury be excused in order to explain to the court the relation the opium bore to the case, viz.: that it was a part of the *res gestae* and also that its admission came within one of the exceptions to the rule that evidence touching the commission of crimes other than the one charged in indictment will not be admitted.

“Generally speaking evidence of other crimes is competent to prove the specific crime charged when it tends to establish,

- (1) Motive,
- (2) Intent,
- (3) The absence of mistake or accident,
- (4) A common plan or scheme embracing

the commission of two or more crimes so related to each other that proof of one tends to establish the other,

(5) The identity of the person charged with the commission of the crime on trial."

Wharton's Criminal Evidence, 9th Ed. Sec. 48;

Underhill Evidence, Sec. 58;

Abbott Trial Brief, Crim. Trials, Sec. 598.

The above is quoted from the famous New York murder case of *People vs. Molineaux*, reported in 62 L. R. A. 193, also 168 N. Y. 264. This case is a very important one and is probably the leading case in this country on this particular proposition. The editors of L. R. A. have written one of the most exhaustive briefs found in the series on this subject in an extended editorial foot note.

To the above exceptions to the general rule may be added cases where the evidence of the independent crime is a part of the *res gestae*.

It has been said that it would be a singular rule of law that a person accused of a grave crime could compel the exclusion of important and rele-

vant testimony, merely by committing two felonies at the same time, or so nearly and intimately connected that the one could not be proved without proving the other.

State vs. Folwell, 14 Kan. 105;

State vs. Adams, 20 Kan. 311;

People vs. Walters, 98 Cal. 138, 32 Pac. 864.

Had objection been seasonably made we should have contended that the opium incident was so interwoven with the facts relating to the Chinese as to become a part of the *res gestae*. We should further have argued that the plan to bring in opium came within exceptions *one*, *two* and *four* as indicated in the *Molineaux* case.

Proof of the bringing in of opium tended to show: (1) *Motive*—viz., that Lortie and his associates were dealing in contraband for gain.

It also tended to show (2) an *intent* to smuggle Chinese and opium generally as is evidenced by the Lortie, Lim Jim, and Louie Ding interview in Seattle early in the fall.

And a *fortiori* it showed clearly a plan and

scheme common to both offenses, viz., the same means were to be employed. The same Chinese were operating under a common plan to introduce both opium and Chinese. The commission of the one crime necessarily and inseparably involved the other. We do not believe, however, that this court will listen very patiently to a claim of error predicated upon the admission of this evidence where trial counsel for defendants permitted three witnesses for the government to be interrogated at length upon every phase of the opium incident both on direct and cross-examination and only made his objection to its introduction after the subject had been practically exhausted and the testimony relating to it closed.

THIRD.

This subdivision of plaintiffs' brief is given over to a discussion of evidence tending to show Louie Lung Gin's part in the conspiracy. The contention is that the court should have directed a verdict of not guilty in Lung Gin's case.

The evidence shows that Louie Lung Gin is Louis Ding's nephew. It shows that he worked for

Ding at his place of business on King Street in the Milwaukee Hotel during the fall of 1915. (See Mrs. Hirati's testimony and also that of Sammy Brown in the Bill of Exceptions.) Their testimony is to the effect that he was working in Seattle during the fall and until after Christmas, when he left for Portland, taking with him an envelope with Mrs. Hirati's (proprietress of a Japanese grocery) Seattle address on it. He claimed when arrested that he had not been in Seattle since August of 1915, yet there was found on his person the envelope with the Hirati address on it and also Sammy Brown's letter. These facts appear in the testimony of Mrs. Hirati (Bill of Exceptions, p. 248), Sammy Brown (Bill of Exceptions, p. 257), Thos. Fisher (Bill of Exceptions, p. 276), Inspector Bonham (Bill of Exceptions, p. 427), Inspector McGrath (Bill of Exceptions, p. 368).

At this point we should frankly state to the court that the testimony relating to Lung Gin's denial, viz: that he had not been in Seattle since the preceding August, and the finding of the Hirati envelope and the Sammy Brown letter on his per-

son were by inadvertence left out of the printed transcript. Counsel for plaintiff in error came into the cause after the trial in the lower court. In order to acquaint themselves with the testimony in its entirety they caused a complete statement of all the testimony to be presented as a bill of exceptions in the case. The evidence in the case with a complete record of the trial was contained in a book covering six hundred and ninety pages of typewritten matter. Subsequently when the record for this court was being prepared, counsel for plaintiffs in error sought a stipulation for the printed record which would embody the points they intended to present to this court. The brief of plaintiffs in error had not then been written and the scope of the record in this court was necessarily confined to oral statements as to counsels' position. We believe that in their zeal to present their cause they have in their brief inadvertently widened the inquiry from some of the statements made. In any event, we ask the courts' indulgence in furtherance of justice to permit us to refer to the established facts of the case by reference to the bill of exceptions, of record

but not printed, when passing upon the important matter of Lung Gin's participation and guilt, a conclusion which cannot be accurately arrived at without considering all of the evidence touching him in the case.

The whole evidence bearing on Lung Gin's part is as follows: Lortie testified that Louie Ding told him he was going to California during the first interview at the flat, when the details of the crime were planned by Lortie and Ding. Ding then told Lortie to bring the Chinese to the flat and deliver them to Dan and Lung Gin, and that Lung Gin would pay him. (See Transcript, pp. 67 to 78 inc.) This testimony was followed by that of Lortie in relating his part in the transaction on the night of December 15th, when the Chinese were arrested at the Harrison dock. He states that he met Lung Gin and Dan by appointment at the flat. That all were excited because of a newspaper story showing that the plot had been discovered and the officers were combing the waterfront to arrest the whole party. Arrangements were made to go out to Harrison Street after them. Lortie then went to Harrison

Street where a little later he met Ito, the chauffeur, and Lung Gin. Lortie gave directions to Lung Gin about the opium suit cases and the smuggled Chinese and then left. (See Transcript, pp. 71 to 75.) Fisher's testimony in the bill of exceptions, together with that of Ito, shows that Lung Gin employed Ito and made the trip out to Harrison Street with him from Chinatown, where the automobile was engaged. This testimony alone is enough to convict Lung Gin, because he was on the ground co-operating with Lortie with full knowledge in the premises, the moment he learned of the arrival of the smuggled Chinese. The fact that Ding told Lortie where to deliver them and what Lung Gin would do, together with what Lung Gin did subsequently of his own volition, shows his active participation in the conspiracy.

His guilt is emphasized and made more apparent when his own testimony is considered, viz: that he came from Portland to Seattle, arriving on the evening of December 15th (the night of the arrest) for the purpose of collecting a bill, and that he had been here for the same purpose in October, when McGrath, Bonham and Fisher, say that he

said when arrested in Portland in February, 1916, that he had not been in Seattle since August, and this notwithstanding the fact of finding on his person the Hirati envelope and the Sammy Brown letter, which he could not explain and did not attempt to explain during his examination as a witness.

Proven contradictions and conflicting statements all serve to show guilt, and when considered with the other facts in this case, evidence his guilt in a striking manner. The letter and the envelope incident, together with the denial of being in Seattle for months, when considered with Lortie's testimony, make a very clear case against him, one much stronger than would appear from Lortie's story of the crime standing alone.

FOURTH.

Counsel's fourth subdivision criticises the instruction given by the trial court upon the question of reasonable doubt. The particular criticism is that the trial court among other things stated that "A reasonable doubt is such a doubt as the jury are able to give a reason for." The objection is that it casts upon the defendant the burden of

creating doubt in the mind of the jurors, for it is said that if the juror cannot give a reason for his doubt he then cannot properly entertain a reasonable doubt, and to require him to give a reason for his doubt is to require the defendant to sustain the juror's reason by the evidence in the case; and that if he fails to make a case strong enough to enable the juror to give a reason for his doubt, then the juror cannot have a reasonable doubt under the court's instruction and is bound to convict him. This same criticism has been before the courts many times. There is hopeless confusion among the authorities as to whether this clause in the instructions constitutes reversible error. What has been said in favor of counsel's position in the cases cited, is not supported by weight of authority in the federal courts. The best expression of law upon this subject is found in a case decided in this Circuit, in 1908, in the case of *Griggs vs. United States*, 158 Fed. 572. This same instruction was given in the *Griggs* case and this court sustained the instruction in question, although suggesting that it was open to some criticism.

“Counsel for plaintiff in error proffered an instruction on the subject of reasonable doubt. The court declined to instruct as requested, and on that subject instructed the jury as follows:

“ ‘The defendant is presumed to be innocent until he is proved guilty by the evidence before you beyond a reasonable doubt. By reasonable doubt is not meant any doubt or conjecture which may occur to your mind, or may be imagined by you; but it is a doubt which must arise from the evidence, or lack of evidence, and for which some reason can be given.’

“Error is assigned both to the refusal to charge as requested and to the charge as given; but the only question to be determined here is whether there is reversible error in the instruction which was given. In *Owens vs. United States*, 130 Fed. 283, 64 C. C. A. 529, in reversing the judgment of the trial court for error in a certain instruction, this court thought it proper to suggest that the following definition of ‘reasonable doubt,’ given to the jury by the court below, should be omitted on a new trial:

“ ‘A reasonable ground of doubt is one which is reasonable from the evidence or want of evidence. It must be a ground of doubt for which a reason can be given, which reason must

be based upon the evidence or want of evidence.'

"And this court remarked:

" 'A doubt arising out of evidence is a mental operation for which it may often be very difficult, and indeed impossible, to assign any reason, and yet, if honestly entertained by the jury in a criminal case, must be acted upon; for they are only authorized to bring in a verdict of guilty when satisfied and convinced beyond a reasonable doubt of the guilt of the accused. Such a doubt has been often and correctly defined as a doubt which is reasonable in view of all of the evidence, and such as arises upon an impartial comparison and consideration of all of it, and prevents the jury from being able candidly and truthfully to say that they have an abiding conviction of the defendant's guilt.'

"It will be observed that this court, while disapproving the phraseology of the instruction, carefully refrained from expressing the opinion that it was ground for reversing the judgment then under consideration. In the definitions of 'reasonable doubt' there is hopeless confusion in the adjudicated cases. Definitions approved in some courts have been held reversible error in others. The difficulty lies in explaining words which perhaps define themselves better than can be done by any paraphrase or elucidation.

tion. Said Mr. Justice Woods in *Miles vs. United States*, 103 U. S. 312, 26 L. Ed. 481:

“ ‘Attempts to explain the term ‘reasonable doubt’ do not usually result in making it any clearer to the minds of the jury.’ ”

“The definition which was given by the court below in the present case was given in substance by Chief Justice Waite in *United States vs. Butler*, 1 Hughes (U. S.) 457, Fed. Cas. No. 14,700, and has been sustained in a number of cases, and, among other, in the following federal decisions: *United States vs. Stevens*, 2 Hask, X. (U. S.) 164, Fed. Cas. No. 16,392; *United States vs. Johnson* (C. C.) 26 Fed. 682; *United States vs. Jackson* (C. C.) 29 Fed. 503; *United States vs. Jones* (C. C.) 31 Fed. 718; *United States vs. Cassidy* (D. C.) 67 Fed. 782. The objection to that definition lies in the danger of conveying the impression to the jurors that the reason for the doubt must be one that can be expressed in words. For this reason it has been rejected in a number of jurisdictions. In others, with better reason, we think, it has been disapproved, but held not to constitute reversible error. *State vs. Sauer*, 38 Minn. 438, 38 N. W. 355; *People vs. Stubenvoll*, 62 Mich. 329, 28 N. W. 883; *State vs. Morey*, 25 Or. 241, 35 Pac. 655, 36 Pac. 573. And we so hold in the present case.”

Griggs vs. United States, 158 Fed. 572, 577-8.

To the same effect is *Marshall vs. United States*, in the Second Circuit, reported in 197 Fed. 511. Here the court said, in speaking of this particular instruction:

“There was no error in charging the jury that ‘by the term reasonable doubt is meant not a capricious doubt, but a substantial doubt—a doubt that you can give a reason for if the court called on you to give one.’ The definition of ‘reasonable doubt’ as being a doubt for which a reason can be given is frequently adopted by trial judges. The criticism that the charge carried with it an implied threat that the jury might be called upon to explain to the court the reasons which induced them to acquit if they found a verdict of not guilty, is hypercritical.”

The rule seems to be so well settled in this Circuit that it seems hardly necessary to make further comment upon counsel’s fourth subdivision.

FIFTH.

Replying to counsel’s fifth and last point, we are compelled to revert again to the matter of the short printed record stipulated in this case. This

record does not purport to give the court's entire instructions in this case, and it seems somewhat unfair to us to single out a paragraph in the instructions and urge reversible error against it when the context so clearly meets counsel's criticism. The Bill of Exceptions at page 670, contains the following:

“Now four of the defendants charged in the indictment have entered a plea of guilty in this case, and they say they did, by their plea of guilty, enter into a conspiracy; their plea don't bind the other defendants; they have testified differently in this case; they have given you what they understand to be their version of this entire transaction. Now if you believe that a conspiracy was entered into only by the persons who pleaded guilty in this case, and you believe that neither persons on trial in this case afterwards joined that conspiracy, then the persons afterwards joining in the conspiracy would be considered conspirators from the beginning, and if you find, beyond a reasonable doubt, as charged in the indictment, it will be your duty to return a verdict of guilty against such of the defendants as you find entered into the conspiracy afterwards.

“Now the fact that these four defendants

entered a plea of guilty, don't show of itself that any of these defendants were members of the conspiracy, or entered the conspiracy, nor should the fact of their plea of guilty be construed against these defendants, except as you may be convinced from the evidence that was given by these parties upon the witness stand; and if you believe that they testified to the truth—told the truth as it actually was, and is, and you are convinced beyond a reasonable doubt from this testimony that these defendants—all of the defendants either were members of the original conspiracy, or joined the conspiracy afterwards, then it will be your duty to convict these defendants whom you believed joined the conspiracy originally, I mean afterwards, or were members of the conspiracy originally, whether the testimony of these other witnesses are corroborated, or not.

“A co-conspirator may be convicted upon the uncorroborated testimony of a co-conspirator—if you believe the testimony of the co-conspirator—but such testimony necessarily must be closely scrutinized; it comes from a polluted source, and jurors should weigh carefully the testimony of a co-conspirator, and compare it with all the facts surrounding, and circumstances which bear upon and have a relation to the offense committed, as disclosed by the tes-

timony upon the witness stand; and, as I said a moment ago, if you are convinced that the defendants who have plead guilty told the truth upon the witness stand as it actually was, and is, and you believe from that, beyond a reasonable doubt, that the conspiracy was entered into, as charged in the indictment, for the purposes charged in the indictment, and these parties were parties to it, either originally or subsequently joined it, then it will be your duty to return a verdict of guilty against all the defendants whom you believe were members of this conspiracy, and return a verdict of not guilty against such persons who were not members of the conspiracy, and who did not join it afterwards."

(Bill of Exceptions, pp. 670-671-672.)

When the additional instructions above referred to are read in conjunction with the instruction complained of, it easily meets counsel's criticism that the jury were not instructed upon the credibility which attaches to the testimony of the co-conspirators, or to those who have pleaded guilty in the case. The court may say that counsel should not have stipulated a short printed record until the issues of the case had been clearly outlined, by

counsel's opening brief. However, the Honorable Court will take into consideration the fact that the opening brief is seldom ever written until after the printed record is fully made up and the court will also take into consideration, we believe, the fact that inasmuch as the assignments of error must be complete and full upon the subject and must accompany the petition for the writ of error, that counsel out of abundance of caution frequently make many assignments which upon further research and deliberation they conclude to abandon in their brief and argument in the appellate court. We are now convinced that we should have included the court's entire instructions in the case in the printed record. In making the above statement we do not mean to reflect upon counsel or to suggest that they misstated their position orally to us in arranging for the stipulated printed record. The fact that this record is somewhat incomplete occurs because the issues we discussed orally, inadvertently were somewhat narrower in our judgment than the position now taken in the briefs. Manifest injustice, however, will result unless the court considers the instruction upon this

subject, and we respectfully pray the court's indulgence in this particular.

It seems idle to discuss the merit of counsel's position as directed to the excerpt taken from the instructions when the instruction as a whole must to any fair mind show that the court covered the subject of accomplices and co-conspirators who had pleaded guilty and instructed the jury fully upon the degree of credibility which must attach to their testimony under such circumstances.

In conclusion the rule on appeal with reference to excerpts taken from instructions appears to be that no criticism will be heard upon a portion of an instruction upon any particular branch of the case.

See *Colt vs. United States*, 190 Fed. 305, 308:

"But the correctness of a charge is not to be determined upon excerpts taken therefrom, and considered apart from other portions bearing upon the same subject. The charge as a whole upon that question must be considered. So considered it cannot be successfully contended that the charge is erroneous."

In conclusion we submit that the assignments of error submitted in this casue are in our judgment without merit and the judgment of the lower court should be affirmed.

Respectfully submitted,

CLAY ALLEN,

United States Attorney.

WINTER S. MARTIN,

Assistant United States Attorney.

IN THE
United States
Circuit Court of Appeals⁴
For the Ninth Circuit.

LOUIE DING et al.,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR REHEARING OF
PLAINTIFFS IN ERROR.

FILED
OCT 16 1917
U. S. DISTRICT COURT
SEATTLE, WASH.

WALTER S. FULTON and
WILLIAM R. BELL,
Attorneys for Plaintiffs in Error,
1112 Hoge Building, Seattle, Washington.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. 2955.

LOUIE DING et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Petition for Rehearing of Plaintiffs in Error.

ARGUMENT.

The principal error relied upon for a reversal of this case was the instruction of the trial Judge in relation to the defense of alibi.

The indictment charged that the conspiracy complained of was entered into by the plaintiff in error, Louie Ding, on the 10th day of December, 1916, in the City of Seattle. The testimony introduced by the Government tended to establish the fact that the conspiracy was formed at the place mentioned, by the plaintiff in error Louie Ding and an alleged co-conspirator, Louis Lortie, about the 10th day of December, 1916, as alleged in the indictment, but not earlier than the 4th day of that month. The time and place of the formation of the conspiracy having been definitely fixed by the evidence of the Government, the plaintiff in error thereupon introduced evidence tending to establish that he was absent from the City of Seattle and the State of Washington from the morning of the 1st day of December, 1916, several days prior to the earliest date fixed by the Gov-

ernment's evidence, until the evening of the 25th day of December following, long after the alleged purpose of the conspiracy had been consummated.

The time and place of the formation of the conspiracy having been definitely fixed by the evidence, and a defense of alibi having been interposed, these questions became material issues in the case.

In the face of the record the trial Judge instructed the jury as follows: "Now it is not necessary that the Government show that this conspiracy was entered into on the 10th day of December; if the testimony shows that the conspiracy was entered into at any time within three years prior to the time of the filing of this indictment by the Grand Jury, which was on the 27th day of March, 1917, it would be sufficient." (Tr., p. 50.)

It is a general rule that instructions must not only state the law correctly, but must be applicable to the issues of the case on trial. In most criminal cases the charge complained of would be correct and appropriate, but where as in this case the element of time becomes a material issue, it is misleading and prejudicial. As soon as the evidence of the Government definitely fixed the time of the formation of the alleged conspiracy, and the defense of alibi was introduced by the plaintiff in error and supported by evidence, the question of the exact time became a material issue; in fact, the most material issue in the case, aside from the general issue of guilt or innocence, and the trial Court should have instructed the jury that if they found that the defendant was not in the City of Seattle when the conspiracy was

alleged to have been formed, they should return a verdict of not guilty.

In the case of *State v. King*, 50 Wash. 312, in dealing with an instruction given in a case where the facts were similar to those in the case at bar, the appellate court clearly points out the correct distinction, as follows: "The defense was that the defendant was not the person who obtained the money, but that he was sick at home, unable to leave his room, between those dates. The time of the commission of the crime was therefore clearly material. There are many cases where no issue is based upon the time when the crime was committed. In such cases this instruction would be correct but was misleading and erroneous in this case, because the time was definitely fixed by the State, and the defense of an alibi was based upon that time. It is difficult to imagine a case where the time of the commission of the crime is not material to a defense of alibi."

To the same effect, see *People v. Morris*, 84 Pac. 463 (Cal.); *State v. Moss*, 73 Wash. 430; *State v. Morden*, 87 Wash. 472.

The reason for the rule thus announced is quite apparent. If the evidence adduced by the prosecution in a criminal case proves or tends to prove that the crime charged was committed upon a certain date, or within a certain period of hours or days, and was committed at a certain place, all that is incumbent upon the defendant, to entitle him to an acquittal, is to establish by evidence that he was not present at the time and place when and where the crime is al-

leged to have been committed, but was elsewhere. Otherwise it would be necessary for him to account for his whereabouts during the entire period of the statute of limitations, usually three years in criminal cases, in order to derive any benefit from the defense of alibi.

The instruction given by the trial Judge in this case not only discredited but entirely destroyed the force and effect of the only defense which the plaintiff in error was able to interpose. Curiously enough this Court, in dealing with the instruction complained of, failed to note the distinction applicable to this class of cases, and consequently fell into the same error as the Court below. In the opinion filed herein we find the following language: "We think these instructions were sufficient to inform the jury on the subject of alibi. The charge being conspiracy, the personal presence of the defendant was not necessary in the making up of the combination, and the Court made it clear enough that the particular conspiracy charged in the indictment and the defendants' participating in it must be established, although the exact date that it was alleged to have been formed need not be proved, provided the evidence showed that it was entered into within three years before the finding of the indictment. Wharton, *Crim. Ev.*, 676; *Jenkins v. State*, 75 S. W. Rep. 312; *Glover v. United States*, 147 Fed. 426; *Hyde v. United States*, 225 U. S. 347."

In the first place, it was never claimed on behalf of the Government that the plaintiff in error Louie Ding entered into the alleged conspiracy through

the medium of an agent or employee, or by the use of the mail or the telegraph service, or by any other indirect method. The only evidence introduced by the Government on this point was to the effect that the plaintiff in error and one Louis Lortie, a Government witness, formed this conspiracy in person on the 10th day of December, 1916, and in the City of Seattle. That was the issue tendered by the Government, and the only issue which the plaintiff in error was required to meet. The time was definitely fixed, the place was definitely fixed, and the persons present were definitely fixed. For this reason the suggestion in the opinion of this Court just above quoted, that the personal presence of the defendant was not necessary to the formation of the conspiracy, is purely gratuitous.

The instruction of the trial Court on this subject is clear. After pointing out that in conspiracy cases the personal presence of the defendant is not essential, it closes with this statement: "In this case the testimony is that the conspiracy was entered into while he (the defendant) was here."

In the second place, as pointed out in the earlier part of this petition, the exact date or dates of the formation of the alleged conspiracy was the most material issue in the case, and it was not sufficient to prove that it was formed or entered into by the plaintiff in error at any time within three years prior to the finding of the indictment. The effect of such a rule in a case like the present, where the time and place of the commission of the alleged crime was

a material issue, is to nullify and destroy the defense of alibi. The very authorities cited in the opinion of the Court show the fallacy of the rule adopted, and completely discredit it.

The citation from Wharton lays down the rule that while in many cases of conspiracy an alibi cannot be shown in defense, yet where a direct issue is raised as to the absence of the defendant at the time of the formation of the conspiracy, alibi is a proper and meritorious defense.

The citation referred to is as follows: "Where the prosecution establishes a conspiracy on the part of two or more persons to do any unlawful act, an alibi cannot be shown in defense, as in a conspiracy the presence or absence of one of the conspirators at the exact time, or the time covered by the findings, is immaterial, and an instruction upon the defense of alibi would be misleading. But where a direct issue is made as to absence at the time of the formation of the conspiracy, alibi is a proper defense."

The authority cited in support of the text by the learned author is the second citation contained in the opinion of this Court, to wit, *Jenkins v. State*, 75 S. W. Rep. 312.

In the present case a direct issue was raised as to the absence of the plaintiff in error Louie Ding, not only at the time of the formation of the conspiracy, but during all of the time of its existence, and until long after it was consummated; and consequently his defense of alibi was a proper one, and should not have been discredited either by the trial Court or by this Court.

The other two cases cited, Glover v. United States, and Hyde v. United States, have not even the most distant application to the issue involved, and give neither color nor support to the rule adopted by this Court; and we venture the assertion that no case can be found, either in the State or Federal authorities, which even by a strained construction will support the rule laid down by this Court in the case at bar.

In conclusion, we submit that a rehearing should be granted in this case, and the erroneous rule adopted by the Court in this cause be promptly corrected, not only for the benefit and protection of the plaintiff in error, but for the benefit and protection of other defendants in criminal cases who may find themselves without any other defense available than that of alibi.

Respectfully submitted,

WALTER S. FULTON and

WM. R. BELL,

Hoge Bldg., Seattle,

Attorneys for Plaintiffs in Error.



United States
Circuit Court of Appeals

For the Ninth Circuit.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,

Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

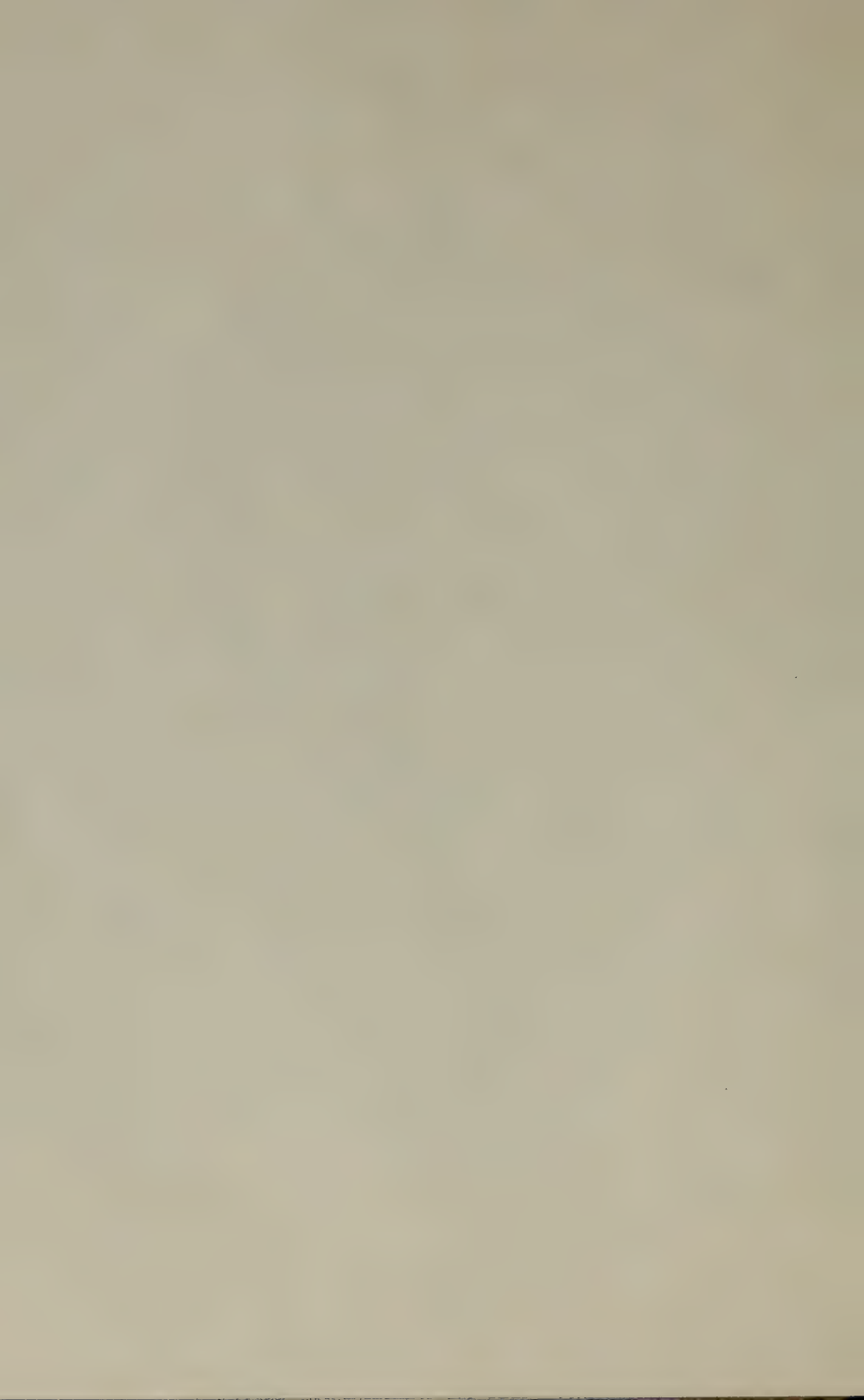
Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

Filed

MAY 2 - 1917

F. D. Monckton,
Clerk.



United States
Circuit Court of Appeals
For the Ninth Circuit.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,

Plaintiff in Error,

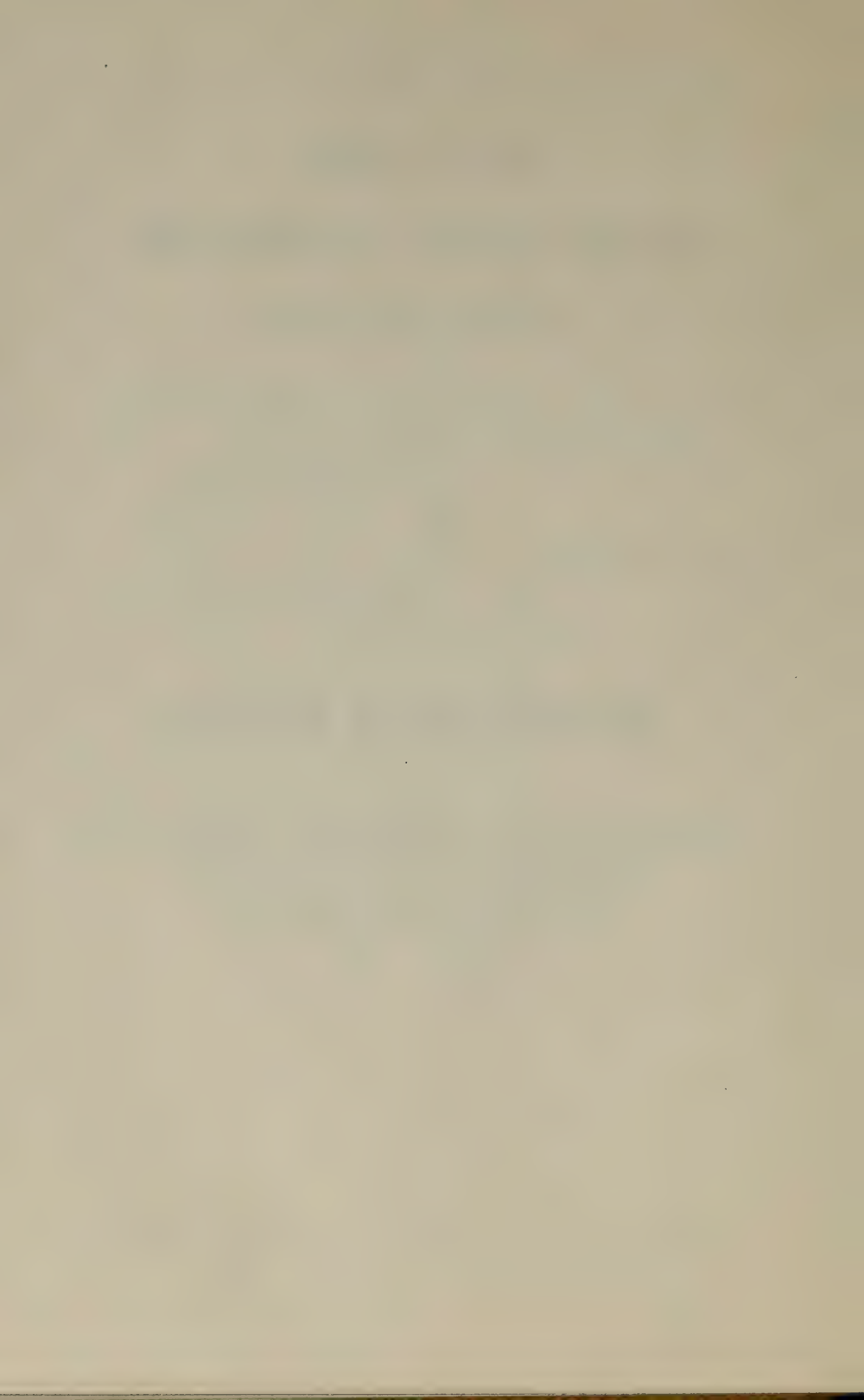
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the United States District Court for the Northern
District of California, Second Division.*

No. 15,796.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,
Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Amended Complaint.

Now comes the above-named plaintiff, by leave of Court first had and obtained, and files this its first amended complaint in the above-entitled action and complains of the defendant above-named, and for cause of action alleges:

I.

That plaintiff now is, and ever since the 9th day of April, 1913, has been, a corporation duly organized and existing under and by virtue of the laws of the State of Arizona.

II.

That the defendant is a citizen and subject of the German Empire.

III.

That at the time of the commencement of this action the defendant was and ever since the 21st day of January, 1908, had been continuously absent from the State of California and from the United States of America.

IV.

That heretofore, to wit, on the 5th day of June, 1908, the defendant became and was indebted to one

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Edward O. Allen [1*] in the sum of sixty-eight thousand four hundred sixty and 59/100 (\$68,460.59) dollars, for money had and received by defendant to and for the use of said Edward O. Allen within twenty (20) months prior to the said 5th day of June, 1908.

V.

That the defendant promised to pay said sum, but though demand has been made upon him, he has not paid the said sum, or any part thereof, or any of the interest due thereon, and the whole of said sum, together with interest thereon, is now due, owing, and unpaid.

VI.

That on the 24th day of April, 1913, the said Edward O. Allen assigned and transferred the said claim unto this plaintiff, and plaintiff ever since has continued to be and now is the lawful owner and holder thereof.

And for a second cause of action against said defendant, plaintiff alleges:

I.

That plaintiff now is, and ever since the 9th day of April, 1913, has been, a corporation duly organized and existing under and by virtue of the laws of the State of Arizona.

II.

That the defendant is a citizen and subject of the German Empire.

III.

That at the time of the commencement of this

*Page-number appearing at foot of page of original certified Transcript of Record.

action the defendant was and ever since the 21st day of January, 1908, had been continuously absent from the State of California and from the United States of America. [2]

IV.

That on the 28th day of May, 1908, the defendant became indebted to one J. Dalzell Brown in the sum of forty thousand (\$40,000) dollars, for money paid by the said J. Dalzell Brown for the use of defendant and at defendant's request within twenty (20) months prior to said 5th day of June, 1908.

V.

That thereafter on the said 28th day of May, 1908, and prior to the commencement of this action, the said claim of said J. Dalzell Brown against said defendant was transferred and assigned by the said J. Dalzell Brown to one Edward O. Allen; that thereafter, to wit, on the 24th day of April, 1913, the said Edward O. Allen assigned and transferred the said claim unto this plaintiff, and plaintiff ever since has continued to be and now is the lawful owner and holder thereof.

VI.

That the defendant promised to pay said sum, but though demand has been made upon him, he has not paid the said sum, or any part thereof, or any interest due thereon, and the whole of said sum, together with interest thereon, is now due, owing, and unpaid.

And for a third cause of action against said defendant, plaintiff alleges:

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I.

That plaintiff is now, and ever since the 9th day of April, 1913, has been, a corporation duly organized and existing under and by virtue of the laws of the State of Arizona.

II.

That the defendant is a citizen and subject of the German Empire. [3]

III.

That at the time of the commencement of this action the defendant was and ever since the 21st day of January, 1908, had been continuously absent from the State of California and from the United States of America.

IV.

That on or about the 20th day of September, 1906, at Lakeport, County of Lake, State of California, the defendant and one L. J. Shuman entered into a written agreement for the purchase of certain land in the county of Lake, State of California, a copy of which agreement is attached hereto, made a part hereof, and marked Exhibit "A."

V.

That thereafter and on or about the said 20th day of September, 1906, the said L. J. Shuman transferred, assigned, and set over the said contract, together with all rights arising thereunder and under said transaction unto one J. Dalzell Brown.

VI.

That pursuant to the terms of said agreement, the said J. Dalzell Brown paid to said defendant on account of said purchase price, the first, second, and

third installments in the amounts and at the times specified in said contract, and also paid to said defendant the interest mentioned in said agreement, in the amounts and at the times therein specified; that said J. Dalzell Brown, at the date of the execution of said agreement, also paid to defendant the sum of thirty-five hundred (\$3500) dollars, making a total paid to said defendant on account of said purchase price, including interest, of twenty-eight thousand four hundred and sixty and 59/100 (\$28,460.59) dollars. [4]

VII.

That pursuant to the terms of said agreement said Brown, on or about the 15th day of December, 1906, entered into possession of the premises mentioned in said agreement; that between said 15th day of December, 1906, and the 18th day of December, 1907, said Brown, with the knowledge and consent of said defendant, made and constructed valuable improvements upon said premises, and prior to the 18th day of December, 1907, had expended in making said improvements the sum of forty thousand (\$40,000) dollars; that said improvements are now of the value of forty thousand (\$40,000) dollars to said defendant.

VIII.

That on or about the 15th day of December, 1906, pursuant to the terms of the said agreement, the defendant furnished to the said Brown abstracts of title covering the lands agreed to be sold in and by the said written agreement Exhibit "A"; that pursuant to the terms of the said agreement, the said

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Brown, within 30 days after receipt of the said abstract, reported in writing to the defendant objections to the title to said property; that the defects in the title specified by the said Brown in the said written objections rendered the title of the defendant to the property described in said written agreement unmerchantable; that the defendant agreed with said Brown that the said defects rendered the title unmerchantable and undertook and agreed with said Brown to remove the same.

IX.

That the defendant did not remove the said defects within a period of ninety days after the receipt by defendant of said written report; that at the expiration of said period of ninety days the said Brown, at the instance and request of the defendant, agreed to and did extend the time of defendant [5] for the removal of said defects, and both of the parties to the said agreement agreed that said defendant should have a reasonable further time in which to remove said defects.

X.

That thereafter on or about the 12th day of September, 1907, the said Brown at the instance and request of defendant, waived in writing a tender by defendant of a deed of the said premises on the 15th day of September, 1907, as called for by said agreement Exhibit "A," and said defendant, in consideration of said waiver, covenanted and agreed that he, said defendant, would proceed with diligence to remove and would cause to be removed or cured the defects in said title so specified in said written objec-

tions, and that at the earliest possible day thereafter he would cause to be delivered to said Brown a good and sufficient deed conveying said property to said Brown free from the aforesaid defects; and said Brown and defendant then and there agreed that the balance of said purchase price called for by Exhibit "A" should be paid by said Brown to defendant, concurrently with the delivery by defendant to said Brown of such deed.

XI.

That the defendant did not proceed with any diligence to remove or cure, and never has removed or cured, the said defects, but has at all times failed and neglected to cause the same to be removed or cured, and the same never have been removed or cured; that defendant has not at any time delivered or offered to deliver to the said Brown, or to his assignee Edward O. Allen hereinafter referred to, a good and sufficient deed of grant, bargain, and sale covering, or conveying to said Brown or to his assignee Edward O. Allen, the title to the above-described parcels of land.

XII.

That on or about the 18th day of December, 1907, without [6] giving to said Brown any notice, reasonable or otherwise, of his intention to make time again of the essence of said agreement, and without making to said Brown a tender of a good and sufficient deed of grant, bargain, and sale of said premises, and without removing the said defects rendering the said title unmerchantable, the said defendant notified said Brown that he would not be bound

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by said contract Exhibit "A," or by any of the provisions or by the aforesaid modifications thereof, and demanded the possession of the said property from the said Brown and brought an action of ejectment against the said Brown to recover the possession thereof, and thenceforth repudiated the aforesaid contract and agreements, and abandoned the same and treated the same as rescinded.

XIII.

That thereafter and pending said action of ejectment, the said Brown transferred and assigned to one Edward O. Allen the said contract, a copy of which is hereto annexed, marked Exhibit "A" as aforesaid, together with all claims, rights, and interests of every kind and character which had accrued or could or might thereafter accrue by reason of the aforesaid agreements, acts, and transactions.

XIV.

That thereafter and pending the said action of ejectment, the said Allen elected to treat and did thereafter treat the said acts and conduct of defendant, beginning with the 18th day of December, 1907, as an offer to rescind said contract and agreements, and as a rescission thereof, and thenceforth treated said contract and agreements as rescinded and caused to be surrendered up to said defendant the possession of the premises described in the said agreement; that defendant received and accepted and resumed the possession of said premises from plaintiff on or about the 3d day of June, 1908. [7]

XV.

That thereafter on the 24th day of April, 1913, and prior to the commencement of this action said Ed-

ward O. Allen transferred and assigned to this plaintiff all of his rights, claims and interests of every kind and character which had accrued or might thereafter accrue by reason of the aforesaid transactions, and particularly his right to recover from defendant the moneys paid to defendant by said Brown pursuant to said contract Exhibit "A" and the moneys paid out by said Brown for the aforesaid improvements erected by him upon the said premises or the value thereof.

XVI.

That no part of said sum of twenty-eight thousand four hundred and sixty and 59/100 (\$28,460.59) dollars, paid as aforesaid to defendant on account of said purchase price, or interest due thereon, has been repaid by defendant to plaintiff or to plaintiff's assignors, or at all; that no part of said sum of forty thousand (\$40,000) dollars, expended as aforesaid in making improvements on said property, or any interest due thereon has been repaid to plaintiff or to plaintiff's assignors, or at all, and that the whole of said respective amounts, together with interest thereon, is now due and owing from defendant to plaintiff.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of sixty-eight thousand four hundred and sixty and 59/100 dollars, with interest and costs of suit.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Plaintiff.

State of California,

City and County of San Francisco,—ss.

H. S. Elliot, being first duly sworn, deposes and says:

That he is an officer, to wit, the president of the plaintiff corporation in the above-entitled action, and that he makes this affidavit for and in its behalf.

That he has read the foregoing first amended complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated upon information and belief, and as to those matters he believes it to be true.

H. S. ELLIOT.

Subscribed and sworn to before me this 11th day of January, 1915.

[Seal]

ALICE SPENCER,

Notary Public in and for the City and County of San Francisco, State of California. [9]

Exhibit "A" to Amended Complaint—Contract.

Lakeport, Cal., September 20, 1906.

In consideration of Thirty Five Hundred (\$3500) Dollars, the receipt of which is hereby acknowledged, as payment on account of the purchase price herein provided for HEINZ SPRINGE, of the County of Lake, State of California, hereinafter designated as the Seller, promises and agrees to sell to L. J. Shuman, or his assignee, hereinafter designated as the purchaser, for the sum of Fifty-five thousand (\$55,000) Dollars, upon the terms and conditions

herein mentioned all the personal property described in Schedule "A" hereunto attached and hereby referred to and made a part hereof, and all that certain tract of land situate, lying and being in the County of Lake, State of California, commonly known as the Carson Rancho, and particularly described as follows to wit:

The northeast quarter; the southeast quarter; the southeast quarter of the northwest quarter and the northeast quarter of the southwest quarter of section 21; the south half of section 22; the southwest quarter of the southwest quarter of section 23; the northwest quarter, the southwest quarter of the northeast quarter, and the fractional north half of the southwest quarter of section 23; the fractional north half of section 27; the fractional north half of section 28; and the fractional east half of section 29, lying east of slough; all in township 15 north, Range 9 West, Mount Diablo Base and Meridian.

Excepting, however, the following described portion of Section 26 in said township 15 north, Range 9 West, to wit:

The southwest quarter of northeast quarter; the east half of northwest quarter, Lot 2, the east half of the southwest quarter of northwest quarter, and also a part of lot 1, commencing at the northeast corner thereof, running thence west 10 chains, thence south to the meander line of Clear Lake; thence southeasterly along said meander line to the southeast corner of said Lot 1, and thence north to the place of beginning.

Also that certain tract of land situate in the County of Lake, State of California, and being lots

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3, 4, 9 and 12 of Section 6, township 15 north, range 8 west, M. D. M. containing about one hundred and seventy-eight (178) acres of land.

It being expressly understood that the northeast quarter of northeast quarter of said section 21, township 15 north, range 9 west, M. D. M., containing 40 acres of land, and embraced in the above description, is unpatented land, but has been paid for to the State of California, in full, and that patent will be secured as soon as possible.

The seller agrees to furnish an abstract of title covering the lands hereby agreed to be sold complete to date on or before December 15th, 1906. The purchaser is allowed thirty days after receipt of said abstract within which to examine title. Objections to the title, if any, shall be reported to the seller, in writing, within said period of thirty days, and if not so reported shall be deemed to have been waived. The Seller agrees to remove defects rendering the title unmerchantable and specified by the purchaser in his written report of objections; but if said defects (saving and excepting the securing of said patent) are not removed within a reasonable time, not [10] to exceed ninety days after the receipt by the seller of said written report, the purchaser may at his option insist upon the specific performance of the seller's agreement to sell, extend the time for the removal of said defects, or declare this agreement at an end, in which latter event the seller agrees to return to him the sum of money herein receipted for and any further sums paid on account of said purchase price. But if the sale herein provided for is

not consummated under the terms and conditions of the agreement by reason of the failure of the purchaser to pay the balance of the purchase price when due as herein provided, then the sums of money paid the seller on account of the purchase price and interest thereon shall be forfeited and retained by the seller as liquidated damages, and the seller shall be thereafter released from all further obligation in law and equity, to convey said lands, and may, at once, take possession thereof, and re-rent the same.

The balance of the purchase price, the sum of Fifty-one thousand five hundred (\$51,500) Dollars shall be paid as follows:

I. The sum of thirteen thousand (\$13,000) Dollars shall be paid on the 15th day of December, 1906. It is understood and agreed that this payment includes a payment of five thousand dollars (\$5000) on account of the purchase price of the land above described, and eight thousand (\$8,000) Dollars as the purchase price of the stock and other personal property herein agreed to be sold.

II. The further sum of Five thousand (\$5,000) Dollars shall be paid on the 15th day of March, 1907.

III. The further sum of Five thousand (\$5,000) Dollars shall be paid on the 15th day of June, 1907.

IV. A final payment of twenty-eight thousand five hundred (\$28,500) Dollars shall be paid on September 15th, 1907.

The delivery to the purchaser of a good and sufficient deed of grant, bargain and sale covering title to said above described parcels of land and payment of said last installment of twenty-eight thousand five

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hundred (\$28,500) Dollars of the purchase price are concurrent conditions.

It is understood and agreed that all deferred payments shall bear interest from date until time of payment at the rate of six and one half ($6\frac{1}{2}$) per cent. per annum and that said interest shall be paid quarterly, commencing with the 15th day of December, 1906, and which said interest payments are as follows, to wit:

The sum of Seven hundred ninety and $40/100$ (\$790.40) Dollars on December 15th, 1906;

The sum of Six hundred twenty-five and $62/100$ (\$625.62) Dollars on March 15th, 1907.

The sum of Five hundred forty-four and $57/100$ (\$544.57) Dollars on June 15th, 1907; and

The sum of Four hundred sixty-three $12/100$ (463.12) Dollars on September 15th, 1907. [11]

It is understood and agreed that the seller shall deliver possession of all the property herein agreed to be sold at the time of making the payment of Thirteen thousand (\$13,000) Dollars on December 15th, 1906, but any loss or damage thereto after the date hereof, shall be at the risk of the purchaser. None of the said property hereafter shall be removed from said premises by said seller, but he shall be permitted to use all necessary firewood for his own domestic purposes, and shall also have the right to the milk from the cows now being milked on said Ranch, up to the 15th day of December, 1906.

The purchaser agrees to pay the salary of the present foreman of said Carson Rancho (or should he leave such other foreman as may be selected by the

seller) the sum of Sixty (\$60) dollars per month from the day of this agreement until said 16th day of December, 1906.

It is agreed between the parties hereto that taxes for the present fiscal year commencing on the first day of July, 1906, shall be prorated between the parties hereto in proportion to the length of their several possessions of the land, that is to say, the seller agrees to pay his *pro rata* of said taxes computed from the first Monday of March, 1906, up to the 15th day of September, 1906, and the purchaser agrees to pay all taxes after that date.

It is also understood and agreed that the purchaser shall hereafter bear the cost of necessary repairs, and of such improvements as to which he may consent.

The seller agrees to pay portions of the property herein agreed to be sold to such persons as may be named by the Purchaser upon payment to the seller of one hundred and fifty dollars (\$150) per acre, if the tract so to be conveyed is situate in either of sections 27, 28, or 29, and that part of section 26, as hereinafter provided, or if the tract so to be conveyed is situate elsewhere, upon the payment of Ten (\$10) Dollars per acre; but it is expressly provided that the tracts of land so to be conveyed shall contain at least one hundred (100) acres each and that tracts shall only be sold and conveyed in the following manner and parcels, to wit:

The FIRST tract to be sold shall be as follows:

The south half of northwest quarter of northwest quarter; the west half of southwest quarter of north-

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east quarter of Section 26, also beginning at the northwest corner of Lot One (1) of said section 26, and running thence east ten chains, thence south to the meander line of Clear Lake, thence northwesterly along said meander line to the southwest corner of said Lot One (1) and thence north to beginning; Lot four (4) and the south half of northeast quarter of northeast quarter of section 27.

All being in township fifteen (15) north, range nine (9) west, M. D. M., containing in all 106 acres, more or less.

THEREAFTER no tract or tracts shall be sold and conveyed in said sections 27, 28 and 29, unless it be contiguous and adjoin to a tract of land already conveyed, and must contain at least 100 acres in each tract, and must be in compact parcels of even width and running directly back from the meander line of Clear Lake to the north line of said sections 27, 28 and 29; that is to say it is intended, that all of the lands situate in [12] said section 27 contiguous to said last above-described tract and running to the north line of said Section 27, shall next be sold before any other lands.

It is also agreed between the parties hereto that the purchaser may take any payments or any portion of any payments before they become due under the terms of this agreement; and that all payments made under the terms of this contract are to be considered as being made on account of the payment then due, or if no payment is then due, on account of the payment next becoming due under the terms of this agreement; but it is expressly understood that the interest installments shall be paid in full as herein-

above provided and that any payments made before they become due hereunder shall not affect or reduce said interest.

It is understood and agreed by and between the parties to this agreement that it is the intention of the seller to sell and of the purchaser to buy all of the real property and property rights of every kind and nature whatsoever owned by the seller, and situate in the County of Lake, State of California, excepting only the lands heretofore described as being excepted from the Carson Rancho, and situate in said Section 26; and it is agreed that any real properties situate in the County of Lake owned by the seller shall be deemed to be and be covered by this agreement though said real properties are not specifically described herein.

Time is made the essence of these agreements.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 20th day of September, 1906.

Executed in triplicate.

HEINZ SPRINGE. (Seal)

L. J. SHUMAN. (Seal)

SCHEDULE "A."

All of the horses, cattle, hogs, farming implements, now situate and contained on the premises herein described, saving and excepting one horse named Mont Bello.

[Endorsed]: Filed Jan. 11, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [13]

*In the United States District Court for the Northern
District of California, Second Division.*

No. 15,796.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Answer to Amended Complaint.

Now comes the defendant above named and for his answer to the amended complaint of plaintiff above named admits, denies and alleges as follows:

Answer to plaintiff's first count:

I.

Defendant has no information or belief upon the subject sufficient to enable him to answer the allegation of the amended complaint in that behalf, and placing his denial upon that ground denies that the plaintiff now is, or ever since the 9th day of April, 1913, or at all has been, a corporation duly or at all organized or existing under or by virtue of the laws of the State of Arizona, or at all is a corporation.

II.

Admits that this defendant was absent from the State of California and from the United States of America at the time of the commencement of this action, but denies that he was absent from the State of California or from the United States of America, from the 21st day of January, 1908, until the com-

mencement of this action, or otherwise or at all, except that he was absent from said State of California and from the United States of America from the 14th day of December, 1908, to and including the time of the commencement of this action. [14]

III.

Denies that heretofore, to wit, on the 5th day of June, 1908, or otherwise or at all, the defendant became or was indebted to one Edward O. Allen in the sum of \$68,460.59, or in the sum of any number of dollars, or was at all indebted to said Edward O. Allen for moneys had or received by defendant to or for the use of said Edward O. Allen within twenty months prior to the said 5th day of June, 1908, or was otherwise or at all indebted to said Edward O. Allen.

IV.

Denies that the defendant promised to pay said or any sum. Denies that any demand has been made upon the defendant by said Edward O. Allen or by the plaintiff for the payment of said or any sum, and denies that the whole or any part of said or any sum, or together with interest thereon, is now or at all was due or owing or unpaid.

V.

Defendant has no information or belief upon the subject sufficient to enable him to answer the allegation of the amended complaint in that behalf, and placing his denial upon that ground denies that on the 24th day of April, 1913, or at any time or at all, the said Edward O. Allen assigned or transferred the said or any claim unto this plaintiff, or that

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plaintiff ever since or at all has been or continues to be, or now is, the lawful or any owner or holder thereof.

Answer to plaintiff's second count:

I.

Defendant has no information or belief upon the subject sufficient to enable him to answer the allegation of the amended complaint in that regard, and placing his denial upon that ground denies that the plaintiff now is, or ever since the 9th day of April, 1913, or at all has been, a corporation duly or at all organized or existing under or by virtue of the laws of the State of Arizona, or at all is a corporation.

[15]

II.

Denies that ever since the 21st day of January, 1908, or otherwise or at all than since the 14th day of December, 1908, the defendant has been, up to the time of the commencement of this action, continuously absent from the State of California or from the United States of America.

III.

Denies that on the 28th day of May, 1908, or at any time or at all defendant became or was indebted to one J. Dalzell Brown in the sum of forty thousand dollars (\$40,000), or in any number of dollars, or was at all indebted to said J. Dalzell Brown, for moneys paid by the said J. Dalzell Brown for the use of defendant or at defendant's request or otherwise or at all, within twenty months or any number of months or at all prior to said 5th day of June, 1908, or other time or at all.

IV.

That the defendant has no information or belief upon the subject sufficient to enable him to answer the allegations of the amended complaint in that regard, and placing his denial upon that ground denies that thereafter on said 28th day of May, 1908, or at any time or at all, or prior to the commencement of this action, the said claim of said J. Dalzell Brown against this defendant was transferred or assigned by the said J. Dalzell Brown to one Edward O. Allen, or that thereafter, to wit, on the 24th day of April, 1914, or at any time or at all, the said Edward O. Allen assigned or transferred the said claim unto this plaintiff, or that plaintiff ever since or at all has been or continues to be, or now is, the lawful owner or any owner or holder thereof; denies that the defendant promised to pay said or any sum; and denies that any demand has been made upon the defendant for said sum or any sum; and denies that the whole or any part of said or any sum, or together with interest thereon, is now due or owing or unpaid. [16]

Answer to plaintiff's third count:

I.

Defendant has no information or belief upon the subject sufficient to enable him to answer the allegation of the amended complaint in that regard, and placing his denial upon that ground denies that the plaintiff is now or ever since the 9th day of April, 1913, or at all has been, a corporation duly or at all organized or existing under or by virtue of

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the laws of the State of Arizona, or at all is a corporation.

II.

Denies that defendant was or ever since the 21st day of January, 1908, or at any time other than since the 14th day of December, 1908, up to the time of the commencement of this action, has been continuously or at all absent from the State of California or from the United States of America.

III.

Defendant has no information or belief upon the subject sufficient to enable him to answer the allegations in plaintiff's amended complaint in that regard, and placing his denial upon that ground denies that prior to the 18th day of December, 1907, or at any time or at all one J. Dalzell Brown had expended in making improvements upon the premises referred to in plaintiff's amended complaint on file herein, and described in Exhibit "A" to plaintiff's said complaint, the sum of forty thousand dollars (\$40,000) or any sum in excess of thirty thousand dollars (\$30,000); and defendant denies that said alleged improvements so constructed upon said premises by the said Brown referred to in paragraph VII of plaintiff's third count in its amended complaint are now or at any time have been of the value of forty thousand dollars (\$40,000), or of any value in excess of five thousand dollars (\$5,000) to this defendant, or at all of any value in excess of five thousand dollars (\$5,000). [17]

IV.

Denies that the or any of the objections to the

title to the real property reported by said J. Dalzell Brown to the defendant, as set forth in paragraph VIII of plaintiff's third purported cause of action, on page 5 of its amended complaint, constituted or referred to any defects in defendant's title to said real property which rendered the title of the defendant to the property described in the written agreement referred to in said amended complaint, a copy of which is thereto attached and marked Exhibit "A," unmerchantable; denies that the defendant at any time agreed with said J. Dalzell Brown that said objections or any of them so reported in writing to the defendant constituted defects in defendant's title, or that any of said purported defects in title rendered the title of the defendant to said real property unmerchantable; denies that said defendant undertook or agreed with said Brown to remove any alleged defects in defendant's title to said lands, except that the defendant admits that he informed said J. Dalzell Brown that he would, in so far as he was able, cure any of the objections to defendant's title reported in writing to the defendant.

V.

Denies that the defendant did not remove the said defects in title within a period of ninety days after the receipt by defendant of said written report, except that this defendant admits that he did not cure certain of the objections to defendant's title reported in writing to the defendant as aforesaid, within said ninety days; but denies that any of said objections to title so reported in writing to the defendant

which were not removed within the period of ninety days after the receipt of said written report, constituted or were defects in defendant's title which rendered the title of the defendant to said real property unmerchantable; denies [18] that after the expiration of said period of ninety days or any time or at all the said Brown, at the instance or request of said defendant, or otherwise or at all, agreed to or did extend the time of defendant for the removal of said or any defects, or both or either of the parties to said agreement agreed that said defendant should have a reasonable or any further time in which to remove said or any defects; and denies that the defendant at any time requested the said Brown to extend defendant's time to remove any alleged defects in defendant's said title, or any objections to said title so reported in writing to the defendant.

VI.

Admits that on or about the 12th day of September, 1907, said J. Dalzell Brown, at the request of defendant, waived in writing a tender by defendant of a deed of the said premises referred to in plaintiff's said complaint on the 15th day of September, 1907, but denies that the defendant, in consideration of said waiver, or otherwise or at all, covenanted or agreed with said Brown, or at all, that he, said defendant, would proceed with diligence, or would at all proceed to remove or would cause to be removed or cured the or any defects in defendant's title so or at all specified in said written objections; or that at the earliest possible day thereafter, or

otherwise or at all, he, the defendant, would cause to be delivered, a good or sufficient deed conveying the said property to said Brown free from the aforesaid or any defects, or otherwise or at all agreed, except as set forth in the said written agreement between defendant and said L. J. Shuman, a copy of which agreement is appended to plaintiff's said amended complaint and marked Exhibit "A," and by reference made a part of this answer. Denies that said Brown or defendant then or there or at all agreed that the balance of said purchase price called for by said contract of sale, a copy of which is attached to plaintiff's said complaint and marked Exhibit "A," should be paid by said Brown to defendant [19] concurrently with the delivery by said defendant to said Brown of such deed, or otherwise or at all, except as in said contract of sale of date September 20, 1906, set forth and as may be hereinafter in a further and separate answer alleged.

VII.

Denies that the defendant did not proceed with any diligence to remove or cure, or never has removed or cured, the said defects, and denies that the said defendant has at all times or at all failed or neglected to cause the same to be removed or cured, and denies that the same never have been removed or cured. Denies that the defendant has not at any time delivered or offered to deliver to said Brown a good or sufficient deed of grant, bargain or sale covering or conveying to said Brown the title to the above-described parcels of land or the

lands referred to in said Exhibit "A" to plaintiff's said amended complaint.

VIII.

Denies that on or about the 18th day of December, 1907, or at any time, or without giving to said Brown any notice, reasonable or otherwise, of his intention to make time again or at all of the essence of said or any agreement, or without making said Brown a legal or any tender of a good or sufficient deed of grant, bargain or sale of said premises, or without removing the said or any defects rendering said title unmerchantable, the said defendant notified said Brown that he would not be bound by the said contract Exhibit "A," or by any of the provisions or by the aforesaid or any modifications thereof, or demanded the possession of said property from the said Brown, or brought an action of ejectment against the said Brown to recover the possession thereof, or thenceforth or at all repudiated the aforesaid contract or agreements or abandoned the same or treated the same as rescinded, or otherwise or at all except as hereinafter alleged in one of [20] defendant's further and separate answers to plaintiff's amended complaint.

IX.

That defendant has no information or belief upon the subject sufficient to enable him to answer the allegation of plaintiff's amended complaint in that regard, and placing his denial upon that ground defendant denies that thereafter or pending said action in ejectment or at all the said Brown transferred or assigned to one Edward O. Allen the said

contract, a copy of which is annexed to plaintiff's amended complaint and marked Exhibit "A," or together with all or any claims, rights or interests of every or any kind or character which had accrued, or could or might thereafter accrue by reason of the aforesaid or any agreements, acts or transactions.

X.

Denies that thereafter or pending the said action of ejectment or at all the said Allen elected to treat, or did thereafter or at all treat the said or any acts or conduct of the defendant, beginning with the 18th day of December, 1907, or at any other time, as an offer to rescind said contract or agreements, or any of them, or as a rescission thereof, or thenceforth, or at all treated said contract or agreements, or any of them, as rescinded, or caused to be surrendered up to said defendant the possession of said premises described in the said agreement; or that defendant received or accepted or resumed the possession of said premises from plaintiff on or about the 3d day of June, 1908, or at all.

XI.

That defendant has no information or belief upon the subject sufficient to enable him to answer the allegations of plaintiff's amended complaint in that regard, and placing his denial upon that ground denies that thereafter and on the 24th day of April, 1914, or at any time or at all, or prior to the commencement of this [21] action, said Edward O. Allen transferred or assigned to this plaintiff all or any of his rights, claims or interests, of every or

fects making defendant's title to said real property unmerchantable.

VI.

That thereafter and on or about the 15th day of December, 1906, the said J. Dalzell Brown paid to this defendant the first deferred payment referred to in said contract, namely, the sum of thirteen thousand dollars (\$13,000), and that thereupon the said defendant delivered over to said J. Dalzell Brown, as assignee of said L. J. Shuman, the possession of the real property referred to in said Exhibit "A," also all of the horses, cattle, hogs and farming implements referred to in said contract, [23] save and except one horse "Monte Bello," then belonging to the defendant and being upon said real property, which said personal property was of the then agreed value and sale price, pursuant to the terms of said contract, of eight thousand dollars (\$8,000) and that eight thousand dollars (\$8,000) of said thirteen thousand dollars (\$13,000) so paid to the defendant on said 15th day of December, 1906, together with interest thereon at the rate of $6\frac{1}{2}\%$ per annum from said 20th day of September, 1906, was paid to the defendant as the agreed purchase price of said personal property referred to in said contract, a copy of which is marked Exhibit "A" as aforesaid.

VII.

That thereafter and within ninety days from and after the date of said J. Dalzell Brown reported to this defendant his said written objections to defendant's said title, defendant caused to be cured

of record certain of the said purported objections to defendant's said title; and thereupon, and on or about the 1st day of May, 1907, the said J. Dalzell Brown, assignee of said contract of said L. J. Shuman, as aforesaid, and as such assignee, elected to insist and did insist upon the specific performance by the defendant of his seller's agreement to sell to the said J. Dalzell Brown as assignee of said L. J. Shuman, as aforesaid, the real and personal property in said agreement referred to, at the price and upon the terms of sale in said contract set forth. And said J. Dalzell Brown did thereupon waive each and all of his said objections to defendant's title to said real property theretofore reported to defendant as aforesaid, and he, the said Brown, did then and there notify the defendant that he so elected to purchase said real and personal property at the price in said contract of sale set forth, notwithstanding any purported defects in defendant's record title thereto, and that he did then waive all defects in said title theretofore [24] reported to defendant. But said Brown then requested the defendant to continue his efforts to remove, in so far as he should be able, the purported defects in the title which had been reported by him to the defendant, which same, the defendant stated to said Brown, he would do, and that the defendant did continue to remove and did remove prior to the 15th day of September, 1907, all said purported defects in his said title, so far as he was able.

VIII.

That thereafter said J. Dalzell Brown paid to the

said defendant, pursuant to the terms of said contract of sale, each and all of the installment payments or principal and interest required to be paid by the purchaser to the defendant pursuant to the terms of said contract, at the times in said contract provided, save and except that the said J. Dalzell Brown at all times has failed, neglected and refused to pay to the defendant the final payment of twenty-eight thousand five hundred dollars (\$28,500) together with interest, required by the terms of said contract of sale to be paid to the defendant on the 15th day of September, 1907.

IX.

That on or about the 18th day of June, 1907, the said J. Dalzell Brown requested the defendant to prepare, execute and acknowledge his grant, bargain and sale deed conveying to California Industrial Company, a corporation, the real property referred to in said contract of sale executed between the said defendant and said L. J. Shuman of date September 20, 1906, and assigned to the said J. Dalzell Brown as aforesaid, and to deliver said deed to the said J. Dalzell Brown on the 15th day of September, 1907, upon the payment to the defendant, by the said J. Dalzell Brown, of the said final payment of twenty-eight thousand five hundred dollars (\$28,500) and interest, referred to in said contract of sale. That thereupon said defendant caused to be prepared, ready for execution, the said grant, bargain and [25] sale deed conveying said real property to said California Industrial Company, and did thereupon submit the same to the said

J. Dalzell Brown for approval, and that the said J. Dalzell Brown did, on or about said June 18, 1907, approve said form of deed, whereupon the same was transmitted to the said defendant at Paris, France, for execution and acknowledgment, and the same was by the said defendant, on or about the 13th day of August, 1907, executed and acknowledged by him and deposited in the mails addressed to The Donohoe, Kelly Banking Company, a banking corporation, at San Francisco, California, for delivery to said J. Dalzell Brown on the 15th day of September, 1907, upon the payment to said banking company for said defendant of the sum of twenty-eight thousand five hundred dollars (\$28,500) together with \$463.12 interest, all in accordance with said contract of sale hereinabove referred to.

X.

That thereafter and on or about the 30th day of August, 1907, said deed from said defendant to the said California Industrial Company was received at San Francisco, California, by the said The Donohoe, Kelly Banking Company. That thereupon said The Donohoe, Kelly Banking Company notified said Brown that the said deed from the defendant to said California Industrial Company was lodged with it for delivery to him, said Brown, upon the payment of said final payment of principal and interest pursuant to the said contract of sale of the 20th day of September, 1906, and thereupon the said Brown informed the said The Donohoe, Kelly Banking Company that he now desired the said deed to said real property to be made to him, the said J. Dalzell

Brown personally, and not to the said California Industrial Company; and the said Brown thereupon requested the defendant, through said The Donohoe, Kelly Banking Company, to execute a new deed to said property to him, the said J. Dalzell Brown, as grantee, in place and instead of to said California Industrial Company; that the said [26] defendant, through his agent at San Francisco, defendant then being in Paris, France then requested the said J. Dalzell Brown to sign a waiver of the production and tender of a deed to said real property on the 15th day of September, 1907, pursuant to the terms of said contract of sale of date the 20th day of September, 1906, in order that the defendant might have an opportunity to execute a new deed in Paris, France, and to transmit the same to San Francisco for delivery upon payment of said final installment of principal and interest; and thereupon, upon the request of the defendant, as aforesaid, and for no other purpose, said Brown did sign and deliver to the defendant such waiver, which is in words and figures following:

“San Francisco, Cal., Sept. 12, 1907.

Mr. Heinz Springe,

c/o Eugene Levy, Esq.,

San Francisco, Cal.

Dear Sir:

With reference to the contract for purchase and sale entered into between yourself and L. J. Shuman, wherein you agreed to convey your Lake County property, with certain exceptions, to Mr. Shuman, or his assignee, I beg to confirm the statement al-

ready made that I am Mr. Shuman's assignee.

I understand that Mr. Springe is now in Paris; that he has signed and acknowledged a deed conveying the property described in the contract with Mr. Shuman to the California Industrial Company, and that this instrument is now in San Francisco; and that Mr. Springe has in San Francisco no attorney in fact.

In confirmation of the understanding reached between Mr. Levy and Mr. Gray, I hereby waive the production of a deed from Mr. Springe to myself on the day specified in the contract between yourself and Mr. Shuman, the understanding between us being that you will with all diligence cause to be delivered to me upon payment of the balance of the purchase price due a proper deed conveying the property under consideration to myself.

Respectfully yours,

(Signed) J. DALZELL BROWN."

XI.

That thereafter, pursuant to the request of said J. Dalzell Brown, said defendant did execute and acknowledge, in [27] Paris, France, and did transmit to The Donohue, Kelly Banking Company, at San Francisco, California, for delivery to said J. Dalzell Brown, a grant, bargain and sale deed from the defendant as grantor to the said J. Dalzell Brown, as grantee, of the real property, and of the whole thereof, described in said contract of sale. That said Bank did thereafter, on the 28th day of October, 1907, notify said J. Dalzell Brown of the receipt of said deed by it, and that it was ready to

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deliver said deed to said Brown upon the payment by him to said bank of the sum of \$28,500 and interest to said date in the sum of \$657.67.

XII.

That on the 29th day of October, 1907, Charles A. Gray, Esq., an attorney at law, of the law firm of Gray & Cooper, having offices in San Francisco, California, and who then was the agent for said Brown for that purpose, and as such agent, and at the request of said Brown, called at the banking rooms of said The Donohoe, Kelly Banking Company, at San Francisco, California, and did thereupon examine said deed and did thereupon state to said bank that said deed was all right and satisfactory to the said J. Dalzell Brown.

XIII.

That at all the dates and times herein mentioned said J. Dalzell Brown was the vice-president and manager of California Safe Deposit and Trust Company, a banking corporation, having its principal office and place of business in San Francisco, California, and that on the following day, to wit, the 30th day of October, 1907, the said California Safe Deposit and Trust Company suspended payment and closed its doors, and was shortly thereafter placed in the hands of a receiver and went into liquidation.

XIV.

That on the 29th day of October, 1907, during business hours, said defendant, through his agent, said The Donohoe, [28] Kelly Banking Company, made a tender, at San Francisco, California, to said J. Dalzell Brown of the said deed from the defend-

ant to said J. Dalzell Brown of the said real property, which deed had been approved as all right and satisfactory by the said J. Dalzell Brown, by his agent as aforesaid, and which deed was in all respects a good and sufficient grant, bargain and sale deed conveying the legal title to said real property to said J. Dalzell Brown.

That upon making such tender the said defendant then and there demanded of said J. Dalzell Brown the payment of the amount then due said defendant under the terms of said contract of sale dated September 20, 1906, as aforesaid. That said Brown thereupon refused and neglected to make such or any payment.

That said Brown made no objection to said tender or to the mode thereof, or to said deed, and made no objection to the sufficiency of defendant's title to the real property in said deed described, and made no objection to the money demand of the defendant, but refused and neglected to pay said amount so demanded or any part thereof; that said Brown then and there gave as his only reason for his failure to make the payment so demanded that he had no money and was unable to make such payment.

XV.

That thereafter, on the 17th day of December, 1907, at the city and county of San Francisco, California, during business hours, said defendant did cause to be tendered to said J. Dalzell Brown the said deed tendered to said Brown on the 29th day of October, 1907, as aforesaid. That said J. Dalzell Brown was then confined in the city prison of the

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city and county of San Francisco, at 64 Eddy Street, San Francisco, California, and that a tender of said deed was then and there made to the said J. Dalzell Brown and a demand was then made upon him to pay the defendant, simultaneously with the delivery of said deed by the defendant, the sum of \$29,461.81, pursuant to the terms of said [29] contract of sale of date September 20, 1906.

That said Brown then and there waived any reading of said deed and stated that he was unable to make any payment for said deed, that he was endeavoring to get an extension of time within which to make such payment, which payment he hoped to be able to make in six months.

XVI.

That at the time of the last-mentioned tender said J. Dalzell Brown made no objection to the method of said tender or to the form or sufficiency of said deed, and he made no claim that there were any defects in defendant's title to said real property; he made no objection to the amount of defendant's demand for money, and made no objection to said tender.

XVII.

That said Brown has not nor has any other person at any time paid or tendered any portion of said last-mentioned installment of principal and interest pursuant to the terms of said contract of date September 20, 1906, and the same and the whole thereof remains wholly unpaid.

XVIII.

That on or about the 16th day of January, 1908,

the said J. Dalzell Brown was in the possession of the said real property, and of the whole thereof, described in said Shuman contract of date September 20, 1906, and thereupon the said defendant, at the said city and county of San Francisco, made demand upon the said Brown that he surrender the possession of said lands and premises, and the whole thereof, to this defendant because of the failure of the said J. Dalzell Brown to make payment of the last installment of the purchase price of said lands pursuant to said Shuman contract of date September 20, 1906, upon tender of deed and demand for said moneys as aforesaid, but that the said Brown then and there refused to surrender the possession of said lands to this defendant, [30] he then representing to this defendant that he had given Central Counties Land Company, a corporation, options to purchase said lands from him, and that if the defendant would refrain from recovering possession of the property that he, the said Brown, would be able to complete his payments for the property in a few months; that the defendant thereupon refused to grant the said Brown any extension of time within which to make said payments.

XIX.

That thereafter on the 16th day of January, 1908, at the county of Lake, State of California, this defendant brought an action herein as plaintiff against the said J. Dalzell Brown in the Superior Court of the said county of Lake, said State of California, said action being entitled, "In the Superior Court of the State of California, in and for the county of

Lake, Heinz Springe, plaintiff, vs. J. Dalzell Brown, John Doe Simons and Alfred White (hereby sued by fictitious names), defendants," same being Superior Court No. 1789, said action being an action in ejectment against the said J. Dalzell Brown and certain other persons to eject the said J. Dalzell Brown and said other persons from the possession of the real property described in said sales contract of date September 20, 1906, and for the possession of said real property.

That appended hereto is a copy of said defendant's complaint in ejectment in said last-mentioned action, which copy of complaint is marked Exhibit 1 and by reference made a part of this answer.

XX.

That thereafter, on or about the 27th day of April, 1908, said J. Dalzell Brown appeared in said last-mentioned action by his attorney at law, Edward O. Allen, the purported assignor of the plaintiff herein, and filed his verified answer in said action, [31] a copy of which answer is hereto attached, marked Exhibit 2 and by reference made a part of this answer.

XXI.

That thereafter and on or about the 23d day of May, 1908, Central Counties Land Company, a corporation, leave of Court first having been asked and obtained, filed in said suit in ejectment its complaint in intervention, a copy of which is hereto attached, marked Exhibit 3 and by reference made a part of this answer. That this defendant made and filed in

said action his answer to said complaint in intervention.

XXII.

That thereafter said ejectment suit came on for trial on the 25th day of May, 1908, before said Superior Court of the county of Lake, all parties thereto appearing in person or by counsel, and said cause having been tried before said Court, and the Court having considered the law and the evidence, made, entered and filed, on the 26th day of May, 1908, in said Court and action its decision and findings of fact and conclusions of law, copies of which are hereto annexed, marked Exhibit 4 and by reference made a part hereof.

XXIII.

That thereafter, on the 26th day of May, 1908, there was duly made and entered in said ejectment suit the judgment of said last-mentioned Court in said action, a copy of which judgment is hereto attached, marked Exhibit 5 and by reference made a part hereof. That said judgment was duly given and made against the defendants therein named, including the said defendant, J. Dalzell Brown, one of the assignors of the plaintiff herein. That said judgment has not been set aside, modified or reversed, and no appeal has been taken therefrom, and that the same remains in full force and effect. [32]

XXIV.

That on or about the 1st day of February, 1908, said J. Dalzell Brown, but without the knowledge or consent of this defendant, delivered over the possession of said real property, and of the whole thereof,

described in said Shuman contract with this defendant of date September 20, 1906, to said Central Counties Land Company, a corporation, and that said Central Counties Land Company remained in possession of said real property and premises until on or about the 3d day of June, 1908, when the said Central Counties Land Company, pursuant to said decision and judgment rendered in said ejectment suit, referred to in paragraph XXIII hereof, and not otherwise, delivered up the possession of said real property and premises to this defendant, and that this defendant has at all times since said June 3, 1908, been in the exclusive possession of said real property and of the whole thereof, claiming the right of possession thereto and to own a fee simple title thereto adverse to all the world.

That neither the said J. Dalzell Brown nor any other person except the said Central Counties Land Company at any time offered to deliver up or did deliver up to this defendant the said real property and premises.

XXV.

That at all the dates and times in paragraphs XVII, XVIII, XIX, XX, XXI, XXII, XXIII and XXIV of this further and separate answer set forth Edward O. Allen, the purported assignor of the plaintiff herein, was an attorney at law and attorney of record for the said J. Dalzell Brown as defendant in said ejectment suit, also of said Central Counties Land Company, as intervenor in said ejectment suit, and also of said J. W. Simons as defendant in said ejectment suit, and appeared in said eject-

ment suit and upon the trial thereof as attorney for said last-named defendants and intervenor. [33]

XXVI.

That at all the dates and times herein mentioned the defendant duly kept and performed all the terms, covenants, conditions and provisions in said contract of September 20, 1906, on his part to be kept and performed.

XXVII.

That this defendant has never rescinded or offered to rescind said contract of sale of September 20, 1906, but on the contrary has at all times and to all persons asserted and maintained that said defendant stood and was standing upon said sales contract of September 20, 1906; and that this defendant made the said tenders of said deed to the said J. Dalzell Brown and brought said suit in ejectment and prosecuted the same to judgment, and took possession of said real property, all in pursuance of and in reliance upon the terms, conditions and provisions of said contract of sale of September 20, 1906, and not otherwise.

XXVIII.

That at all the dates and times herein mentioned between the dates of October 30, 1907, and July 1, 1908, the said J. Dalzell Brown, also the said Central Counties Land Company, were wholly without funds with which to pay the whole or any substantial part of the last installment of \$28,500 and interest required by the terms of said sales contract of date September 20, 1906, to be paid to the defendant, and

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that the failure of said J. Dalzell Brown also said Central Counties Land Company to pay or to tender payment to the defendant of the said sum of \$28,500 and interest, at the times of the demands made upon said J. Dalzell Brown, as aforesaid, was due to the inability of said J. Dalzell Brown, also said Central Counties Land Company, to obtain moneys with which to make such payment.

AND FOR A SECOND, FURTHER AND SEPARATE ANSWER AND DEFENSE TO PLAINTIFF'S SAID AMENDED COMPLAINT AGAINST THE DEFENDANT, THIS DEFENDANT ALLEGES AS FOLLOWS, TO WIT: [34]

I.

Defendant hereby refers to and makes a part of this answer and defense all of paragraphs numbered I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII and XXVIII of defendant's first and separate answer and defense to plaintiff's amended complaint herein, and defendant hereby repeats and alleges everything in said paragraphs contained and prays that the same be taken as and deemed a part of this answer and defense as though the same was herein set out at length.

II.

That on the 14th day of December, 1907, the said J. Dalzell Brown made and entered into with Central Counties Land Company, a corporation organized and existing under and by virtue of the laws of the State of California, a contract for the sale of

1,700 acres of the lands described in said sales contract of September 20, 1906, a copy of which agreement is as follows, to wit:

“OPTION.

IN CONSIDERATION of the sum of One Thousand Dollars (\$1000) to me paid, the receipt whereof is hereby acknowledged, I, L. DALZELL BROWN, hereby grant unto CENTRAL COUNTIES LAND COMPANY, a California Corporation, or its assigns, the right or option to purchase within six months from the date thereof for the additional sum of Sixty Seven Thousand (\$67,000) Dollars all that property, containing seventeen hundred (1700) acres, in the County of Lake, State of California, in Township 15 North, Range 9 West, M. D. M., lying contiguously east of the westerly boundary line of the property sold to me, by assignment from L. J. SHUMAN on the part of HEINZ SPRINGE under a certain contract dated September 20th, 1906; payment of said amount to be made as follows to wit: namely the sum of Thirty Thousand Dollars (\$30,000) in United States Gold Coin, and the balance of Thirty Seven Thousand Dollars (\$37,000) in authorized debenture certificates of said Central Counties Land Company at par value, to wit, \$500 each. At the time of and concurrently conditional with the payment of said amount in the manner aforesaid, I agree to deliver to the nominee of said Company a sufficiency grant, bargain and sale deed conveying a good title to the above described property, free and clear of all liens and incumbrances.

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San Francisco, Cal., September 20th, 1907.

J. DALZELL BROWN.

Witness to the signature of J. Dalzell Brown.

EDWARD O. ALLEN." [35]

III.

That on the 14th day of December, 1907, said J. Dalzell Brown entered into with said Central Counties Land Company a contract for the sale of the remainder of said real property described in said sales contract of September 20, 1906, a copy of which agreement is in words and figures following:

“OPTION.

In consideration of the sum of One Thousand (\$1000) Dollars, to me paid, the receipt whereof is hereby acknowledged, I, J. DALZELL BROWN, hereby grant unto CENTRAL COUNTIES LAND COMPANY, a California Corporation, or to its assigns, the right or option to purchase within six months from the date hereof for the additional sum of Sixty Four Thousand (\$64,000) Dollars, the remaining part of my property, containing Two Hundred and Fifty (250) Acres, more or less, on Clear Lake, California (sold to me by Heinz Springe under that certain contract dated September 20th, 1906, between said Springe and L. J. Shuman), not otherwise agreed to be sold to Central Counties Land Company under that certain option and agreement, dated September 20th, 1907, for the sale of 1700 acres of said property; payment of said amount of \$64,000 to be made as follows, to wit, namely: Said Central Counties Land Company shall assume the satisfaction of all liens levied against said property

in relation to the construction of certain improvements thereon; said company shall also within six months from date pay to me the sum of Twenty Thousand (\$20,000) Dollars in U. S. Gold Coin and at the same time shall execute and deliver a mortgage on said 250 acres and improvements covering the balance of said \$64,000 payable in two years and bearing interest at the rate of 6% net. Upon the payment of said amounts and the delivery of said mortgage within the period stated, and concurrently conditional therewith, I agree to deliver to the nominee of said Company a sufficient grant, bargain and sale deed, covering a good title to the above described property, free and clear of all liens and incumbrances.

San Francisco, Cal., December 14th, 1907.

J. DALZELL BROWN.

Witness to signature of J. Dalzell Brown:

EDWARD O. ALLEN."

IV.

That at no time prior to on or about the 21st day of April, 1914, did the said J. Dalzell Brown or the Central Counties Land Company or the said plaintiff herein, or any other person or [36] persons ever make any claim to the defendant that the said defendant had ever committed any breach of said contract of sale of date September 20, 1906, or at any time had failed to tender a good and sufficient deed conveying a merchantable title to said real property in said contract described, and pursuant to the terms thereof, or that the defendant in any manner whatsoever was in default in the performance of any

term, covenant or condition of said agreement; and at no time prior to on or about said 21st day of April, 1914, did any person make any demand upon this defendant for the return of any moneys paid out or expended by the said J. Dalzell Brown pursuant to said agreement of sale of September 20, 1906, or make any claim to the defendant that said agreement of sale had been rescinded by the defendant or by the said J. Dalzell Brown, or was considered rescinded by the said J. Dalzell Brown or by any person whomsoever, although this defendant remained in the State of California, and had his domicile in said State in the said County of Lake from on or about the 1st day of January, 1908, to and including on or about the 14th day of December, 1908, and at all the dates and times since said date has kept a care-taker on his lands in Lake County, California.

V.

That the real property described in said contract of sale of date September 20, 1906, at all the dates and times herein mentioned was and now is devoted principally to grazing, and is suitable principally for grazing purposes. That there is but a small portion of said land suitable for agriculture, and but a small portion of said lands have at any time been devoted to agriculture. That said lands border upon the shores of Clear Lake, situate in Lake County, California, which Lake is a navigable body of water, and that about three miles of the northerly shore of said Clear Lake is upon the said real property. [37]

VI.

That on or about the 20th day of September, 1906, the said J. Dalzel Brown and certain of his associates conceived a plan of acquiring all or practically all of the lands bordering upon the shores of Clear Lake, in Lake County, California, with the intent and purpose of organizing a corporation or corporations to engage in the business of erecting a dam at the lower end of said Clear Lake, thereby raising the mean level of the waters of said Clear Lake several feet, and then diverting said waters through motors so as to thereby generate electricity for power for distribution and sale to municipalities and individuals, also diverting said waters through canals and conduits upon the adjacent lands for irrigation purposes; and also with the intent and purpose of subdividing a large portion of said lands so bordering on said Clear Lake, including said lands of this defendant, and, after improving the same with roads and boulevards of a superior character, and otherwise beautifying the same, to thereupon place building restrictions upon said lands, and then sell the same to millionaires and other persons of great wealth as and for villa sites and country residences.

VII.

That in pursuance of said plan and scheme of the said J. Dalzell Brown and associates the said J. Dalzell Brown did, on or about the 20th day of September, 1906, obtain from the defendant, through L. J. Shuman, the agent of said Brown, the said contract of sale of date of September 20, 1906, and thereupon did cause his agent, said L. J. Shuman, to forthwith

assign the said agreement to him, the said Brown; and the said Brown did thereafter, on or about the 15th day of December, 1906, enter into possession of the lands in said contract described and did begin the erection of a villa or mansion upon a portion thereof which became known as and is now known as the "J. Dalzell Brown mansion."

That the said J. Dalzell Brown in erecting said mansion [38] had the twofold purpose of erecting a mansion to be used by him as his country mansion or estate, and also as the first one of a large number of similar mansions or villas which he desired erected by millionaires and other persons of great wealth who he, the said Brown, had in mind as prospective purchasers of said subdivisions of said lands.

VIII.

That from on or about the said 15th day of December, 1906, to on or about the 30th day of October, 1907, said J. Dalzell Brown prosecuted the erection of said mansion. That some time during the year 1907 and prior to the 30th day of October, 1907, said J. Dalzell Brown became insolvent and wholly unable to pay his debts as they accrued. That on or about the said 30th day of October, 1907, said J. Dalzell Brown was indebted in large sums of money for labor and material which had been used and expended upon said J. Dalzell Brown mansion, said indebtedness being in excess of \$15,000, and that at no time since said October 30, 1907, was said J. Dalzell Brown able to pay said indebtedness.

IX.

That on or about the 10th day of December, 1907,

this defendant, who was then residing in Paris, France, was advised that said J. Dalzell Brown was insolvent and by reason of such insolvency had failed to make the final installment payment required to be made pursuant to the terms of said contract of sale of date September 20, 1906; and thereupon this defendant left his said residence in Paris, France, and came to California, at large expense to himself, to determine what action should be taken by him to enforce the said contract of sale of September 20, 1906, and to protect the said real property therein described. That the said defendant arrived in San Francisco, California, from Paris on or about the 1st day of January, 1908, and remained [39] in California during all the time thereafter until on or about the 14th day of December, 1908.

X.

That during said last-mentioned period mechanics' liens for labor and material were filed upon said Brown mansion and the real property described in said contract of sale in the sum of \$15,000, approximately, for labor and materials furnished on said Brown mansion at the instance and request of said J. Dalzell Brown, and for which he was indebted, and that threats were made by the holders of said liens to foreclose said liens by the sale of said property; and this defendant, in order to protect his property from sale, and to remove said liens, was forced to pay, and did pay, the claims secured by said liens in the sum of approximately \$15,000.

XI.

That the said J. Dalzell Brown continued work

upon the said Brown mansion until on or about the 30th day of October, 1907, and that at that time said building was but partially completed; and this defendant, during said period between the 30th day of November, 1907, and the 14th day of December, 1908, was compelled to expend, and did expend, in performing work and labor upon said Brown mansion, in enclosing the same and in protecting it from the weather, so that the same would not be destroyed and made worthless by the winter rains and the elements, the sum of more than \$1500.

XII.

That said J. Dalzell Brown mansion has never been occupied or used as a residence by the said defendant or by any other person since its partial erection in 1907 as aforesaid, except that during a small portion of the time since then the defendant has maintained therein a keeper, who occupied a room; and, for a portion of said time, this defendant has camped in two of the forty or more rooms therein.

[40]

That said Brown mansion is suitable only as a mansion for a personage of great wealth and ostentation, who can and is disposed to maintain therein an establishment on a very elegant and elaborate scale, with many servants, including gardeners, grooms, stable-boys, chauffeurs and others. That said mansion is built in a lonely spot, in a sparsely settled community, surrounded by mountains, remote from a great city, and remote from a railroad and all other great arteries of travel; that the inhabitants in the region in which it is built are for the most part

small farmers and stock-growers, of modest means and simple habits, who live in small and simple cottages; that there is no landed gentry or leisure class there.

That this defendant is a man of simple tastes and modest means, and said Brown mansion is wholly unsuited to the uses of a residence for the defendant or to the use of residence for any other person in its present location and in the present state of development of Lake County, California; and that to maintain it properly as a residence would entail far greater expense than the defendant's means would afford or permit, and any possible needs of the defendant or of the community would justify or warrant; and that said J. Dalzell Brown mansion stands now as an almost worthless memorial of the one time roseate dreams and imaginings of said J. Dalzell Brown, and of the wanton and extravagant expenditure of moneys by the said J. Dalzell Brown while manager of the now defunct California Safe Deposit and Trust Company of San Francisco, California.

XIII.

That the hope of the said J. Dalzell Brown to create a colony of millionaires and other persons of great wealth who would erect mansions and villas upon the lands of the defendant hereinabove described failed in toto, and that there were no mansions or villas or other expensive residences erected, and [41] that none are now maintained on or near the said lands of the defendant except the said Brown mansion unoccupied as aforesaid. That said Brown mansion in its present condition is wholly un-

suit for any purpose whatsoever and that the only use that the same can ever be put to, so far as this defendant is informed and believes and therefore alleges, is that of a hotel; but that there is at present no demand for a hotel on said lands, and that there may never be any such demand, and that to convert said Brown mansion into a suitable hotel building would entail the expenditure of a very large sum of money.

XIV.

And defendant avers and alleges that by reason of the facts in this further and separate answer alleged and set forth the said J. Dalzell Brown, also the said Central Counties Land Company, the said plaintiff, and all persons claiming any assignment of any rights whatsoever of the said J. Dalzell Brown under and pursuant to said sales contract of September 20, 1906, including the plaintiff herein, should be and are estopped from claiming or alleging or proving in said action the following, to wit:

(a) That the said J. Dalzell Brown did not, on or about the 1st day of May, 1907, elect to insist that this defendant sell to him, the said Brown, pursuant to said contract of sale of date September 20, 1906, the lands therein described.

(b) That said J. Dalzell Brown did not, on or about the 1st day of May, 1907, elect to waive any and all objections to defendant's title to the lands in said sales contract of September 20, 1906, described.

(c) That said J. Dalzell Brown did not, on or about the 1st day of May, 1907, elect to accept the defendant's record title to said lands as a good and sufficient merchantable title thereto.

(d) That this defendant, on or about the 29th day [42] of October, 1907, also on or about the 17th day of December, 1907, did not tender to the said J. Dalzell Brown a good and sufficient grant, bargain and sale deed conveying a good merchantable title to all of the lands in said sales contract of September 20, 1906, described, in pursuance of and in accordance with the terms, conditions and provisions of said contract of sale; and that this defendant did not thereupon demand from said J. Dalzell Brown the final installment of the agreed sale price of said lands, all in accordance with said agreement of sale; and that the said Brown did not thereupon, and at all times subsequent thereto, fail, refuse and neglect to make such payment, and did not make default in such payment, and was not then guilty of a breach of said agreement of sale on his part as purchaser thereunder, and that he did not thereby become and was in default in his performance of said contract. That at the time of said tenders and each of them the said J. Dalzell Brown did make objection to the mode of said tender, and did make objection to the sufficiency of said deed to convey a good merchantable title to the lands therein described to the grantee therein named.

(e) That the defendant did commit a breach of said contract of sale of September 20, 1906, on or before the 26th day of May, 1908, by failing to tender to said J. Dalzell Brown a good merchantable title to the property described in said agreement of sale of September 20, 1906, and that the said defendant did rescind said agreement of sale and did notify

and represent to the plaintiff or to said J. Dalzell Brown or other person that he, the defendant, would not be bound by said agreement of sale or by any provisions thereof; that the defendant did repudiate said agreement of sale and did abandon the same, and has ever since treated the same as rescinded; and also that the said J. Dalzell Brown, also the plaintiff, and all persons claiming under the said J. Dalzell Brown, as assignee of said agreement [43] of sale of September 20, 1906, did rescind and did offer to rescind said agreement of purchase on or before the 26th day of May, 1908.

AND FOR A THIRD, FURTHER AND SEPARATE ANSWER AND DEFENSE TO PLAINTIFF'S SAID AMENDED COMPLAINT AGAINST THE DEFENDANT, THIS DEFENDANT ALLEGES AS FOLLOWS, TO WIT:

I.

Defendant hereby refers to and makes a part of this answer and defense all of paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, XXIV, XXV, XXVI, XXVII and XXVIII of defendant's first and separate answer and defense to plaintiff's amended complaint herein, and defendant hereby repeats and alleges everything in said paragraph contained and prays that the same be taken as and *deed* a part of this answer and defense as though the same was herein set out at length.

II.

That between the dates December 15, 1906, and October 30, 1907, said J. Dalzell Brown caused to be

erected upon the real property in said contract of sale of September 20, 1906, described a residence or mansion known as the "J. Dalzell Brown mansion," and did expend considerable moneys for materials and labor thereon.

III.

That at some time prior to the said 30th day of October, 1907, said J. Dalzell Brown became insolvent and unable to pay his debts; and on or about said 30th day of October, 1907, said J. Dalzell Brown was indebted to divers persons for labor and material used, employed and expended in the erection of said J. Dalzell Brown mansion, at the instance and request of said J. Dalzell Brown in the sum, in the aggregate of more than fifteen thousand dollars (\$15,000), for which said indebtedness said persons to whom the said J. Dalzell Brown was indebted [44] claimed liens against the property of the defendant hereinabove described under and by virtue of the provisions of Chapter II, Title IV, Part Three, of the Code of Civil Procedure of the State of California, and that said indebtedness did constitute a lien upon said property in the sum of said fifteen thousand dollars (\$15,000).

IV.

That thereafter and prior to on or about the first day of April, 1908, notice of claim of liens for said fifteen thousand dollars (\$15,000) were filed by the said persons to whom the said J. Dalzell Brown was indebted as aforesaid, in the office of the County Recorder of the county of Lake, State of California, all in accordance with the provisions of said Chap-

ter II, Title IV, Part Three, of the Code of Civil Procedure of the State of California, and that upon the filing of said notice of lien said real property of this defendant became and was charged with liens in favor of said creditors of said J. Dalzell Brown in the sum of fifteen thousand dollars (\$15,000). That said J. Dalzell Brown failed and neglected and refused to pay or discharge said indebtedness or to remove said liens or any part thereof, and that this defendant, in order to prevent and save his said property described in said sales contract from being sold by order of Court to satisfy said liens, was compelled to pay and did pay, on or about the first day of May, 1908, the amount of said indebtedness and liens in the sum of fifteen thousand dollars (\$15,000) as aforesaid, by reason whereof this defendant was damaged by the said J. Dalzell Brown in the sum of said fifteen thousand dollars (\$15,000), and is entitled to assert herein a defense and offset of the said claim and demand of the defendant in the said sum of fifteen thousand dollars (\$15,000), together with interest thereon at the rate of seven per cent per annum from the 1st day of May, 1908. [45]

V.

That the incurring of said indebtedness by the said J. Dalzell Brown and the attaching of said liens by reason of said indebtedness upon the lands of this defendant was wholly without the consent and against the will of this defendant.

WHEREFORE, defendant prays judgment that the plaintiff take nothing by this action, and that the defendant have judgment herein for his costs

and disbursements to be taxed.

LUTHER ELKINS,

C. A. S. FROST,

Attorneys for Defendant.

HERBERT V. KEELING,

Of Counsel.

State of California,

County of Lake,—ss.

Heinz Springe, being first duly sworn, deposes and says: That he is the defendant named in the above-entitled action; that he has read the foregoing answer to amended complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

HEINZ SPRINGE.

Subscribed and sworn to before me, this 23d day of March, 1915.

[Seal]

H. V. KEELING,

Notary Public in and for the County of Lake, State of California. [46]

Exhibit "A" to Answer to Amended Complaint.

*In the Superior Court of the State of California, in
and for the County of Lake.*

HEINZ SPRINGE,

Plaintiff,

vs.

J. DALZELL BROWN, JOHN DOE SIMMONS,
and ALFRED WHITE (Hereby Sued by
Fictitious Names),

Defendants.

Complaint in Ejectment.

Plaintiff complains of defendants, and each of
them, and alleges:

I.

That, on the 30th day of October, 1907, the plaintiff was and ever since has been, and now is, the owner and seized in fee of the following described real property, and the whole thereof, to wit:

All that certain tract of land, situate, lying and being in the County of Lake, State of California, commonly known as the Carson Rancho, and particularly described as follows, to wit:

The Northeast quarter (NE. $\frac{1}{4}$); the Southeast quarter (SE. $\frac{1}{4}$); the Southeast quarter of the Northwest quarter (SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$) and the Northeast quarter of the Southwest quarter (NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$) of Section Twenty-one (21); the South half (S. $\frac{1}{2}$) of Section Twenty-two (22); and Southwest quarter of the Southwest quarter (SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$) of Section

Twenty-three (23); the Northwest quarter (NW. $\frac{1}{4}$); the Southwest quarter of the North east quarter (SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$), and the fractional North half (N. $\frac{1}{2}$) of the Southwest quarter (SW. $\frac{1}{4}$) of Section Twenty-six (26); the fractional North half (N. $\frac{1}{2}$) of Section Twenty-seven (27); the fractional North half (N. $\frac{1}{2}$) of Section Twenty-eight (28); and the fractional East half (E. $\frac{1}{2}$) of Section Twenty-nine (29); lying east of slough; all in Township Fifteen (15) North, Range Nine (9) West, Mount Diablo Base and Meridian;

Excepting, however, the following described portion of Section Twenty-six (26) in said Township Fifteen (15) North, Range Nine (9) West, to wit:

The Southwest quarter of the Northeast quarter (SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$), the East half of the Northwest quarter (E. $\frac{1}{2}$ of NW. $\frac{1}{4}$), Lot two (2), the East half of the Southwest quarter (E. $\frac{1}{2}$ of SW. $\frac{1}{4}$) of Northwest quarter (NW. $\frac{1}{4}$), and also part of Lot One (1), commencing at the Northeast corner thereof, running thence West ten (10) chains, thence South to the meander line of Clear Lake, thence Southeasterly along said meander line to the Southeast corner of said Lot One (1), and thence North to place of beginning. [47]

Also that certain tract of land situate in the County of Lake, State of California, and being Lots Three (3), Four (4), Nine (9) and Twelve (12) of Section Six (6), Township Fifteen (15)

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North, Range Eight (8) West, M. D. M., containing about One Hundred seventy-eight (178) acres of land.

—and was, on said 30th day of October, 1907, in possession of said real property hereinabove described, and of the whole thereof; and on said date, and while the plaintiff was so the owner and in possession of said real property, the said defendants, and each of them, entered into said premises and ousted plaintiff therefrom.

That plaintiff on said 30th day of October, 1907, was, and ever since said date has been, lawfully entitled to the possession of said real property, and of the whole thereof, but that defendants, and each of them, have ever since said date unlawfully withheld from plaintiff the possession thereof, and of the whole thereof, to plaintiff's damage in the sum of five thousand dollars (\$5,000).

II.

That the value of the use and occupation of said real property and premises since said 30th day of October, 1907, and while plaintiff has been excluded therefrom by said defendants, is and will hereafter be the sum of four hundred dollars (\$400) per month.

III.

That the true names of said defendants sued herein by the fictitious names of John Doe Simmons and Alfred White, are unknown to this plaintiff, and plaintiff requests that he may be permitted to insert the true names of said defendants so sued by fictitious names as soon as he shall be informed of their true names.

WHEREFORE, plaintiff demands judgment against said defendants and each of them for the possession of said real property and premises hereinabove described; for five thousand dollars [48] (\$5,000) plaintiff's damages by the withholding of the same; and said further sum of Four Hundred dollars (\$400) per month for each month from the said 30th day of October, 1907, until the delivery of said real property and premises, same being the value of the use and occupation thereof; and for plaintiff's costs of suit.

GALPIN, ELKINS & FROST,
Attorneys for Plaintiff.

State of California,
County of Lake,—ss.

Heinz Springe, being first duly sworn, says: That he is the plaintiff named in the foregoing complaint; that he has read said complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters he believes it to be true.

HEINZ SPRINGE.

Subscribed and sworn to before me this 16th day of January, 1908.

[Seal] H. V. KEELING,
Notary Public in and for the County of Lake, State
of California.

[Endorsed]: Filed Jan. 16th, 1908. Shafter
Mathews, Clerk. [49]

Exhibit "B" to Answer to Amended Complaint.

*In the Superior Court of the State of California, in
and for the County of Lake.*

No. 1789.

HEINZ SPRINGE,

Plaintiff,

vs.

J. DALZELL BROWN, JOHN DOE SIMMONS
and ALFRED WHITE (Hereby Sued by
Fictitious Names),

Defendants.

Answer of Defendant Brown.

Now comes J. Dalzell Brown, and for answer to the complaint herein denies and alleges as follows:

I.

Defendant denies that plaintiff was on the 30th day of October, 1907, or at any time since has been, or now is, the owner and seized in fee or seized in fee of the real property the whole thereof or any part thereof, described in said complaint.

Defendant further denies that plaintiff was on said 30th day of October, or at any time since the 15th day of December, 1906, has been, in possession of said property; and denies that on said date, or at any other time, defendant entered into said property and ousted plaintiff therefrom.

Defendant further denies that plaintiff was on said 30th day of October, 1907, or at any time since the 15th day of December, 1906, has been, or now is, law-

fully or otherwise entitled to the possession of said real property, or any part thereof; and while admitting that defendants have withheld from plaintiff the possession of said property, denies that such withholding was or is unlawful, and that plaintiff suffered damage thereby in the sum of \$5,000 or any other sum, or at all. [50]

Defendant further denies that the value of the use and occupation of said real property while plaintiff has been excluded therefrom by defendants is or was the sum of \$400 per month, or any other sum whatever.

II.

But defendant, as and for his affirmative defense, alleges as follows:

That on the 20th day of September, 1906, plaintiff entered into a contract with one L. J. Shuman (a full and *correct of* which contract is hereunto attached and made a part hereof and labeled Exhibit "A") for the sale of the property described in the complaint herein.

That on the 20th day of September, 1906, said L. J. Shuman assigned, transferred and conveyed to defendant, J. Dalzell Brown, by an instrument in writing (a full and correct copy of which instrument is hereunto attached and made a part hereof and labeled Exhibit "B") all his right, title and interest in said contract.

That on the 20th day of September, 1907, defendant J. Dalzell Brown entered into, with Central Counties Land Company, a corporation, organized and existing and doing business under the laws of

the State of California, a contract (a full and correct copy of which contract is hereunto attached and made a part hereof and labeled Exhibit "C"), for the sale of 1,700 acres of the above-mentioned property.

That on the 14th day of December, 1907, defendant, J. Dalzell Brown, entered into, with said Central Counties Land Company, a contract (a full and correct copy of which contract is hereunto attached and made a part hereof and labeled Exhibit "D"), for the sale of the balance of the above-mentioned property as described in said complaint. [51]

That on the 15th day of December, 1906, plaintiff let defendant J. Dalzell Brown into possession of the whole of said property and defendant J. Dalzell Brown, under *and virtue* of said contract labeled herein Exhibit "A," entered into and ever since has been until February 1st, 1908, in complete and undisturbed possession of said property.

That on the first day of February, 1908, defendant J. Dalzell Brown let said Central Counties Land Company into complete possession of said property, and said Central Counties Land Company ever since said date has been, and now is in the full possession of the whole of said real property and is holding the same and claims the right to hold the same, by virtue of the above-mentioned contracts.

That since entering into possession of said property defendant has erected extensive improvements thereon, of the reasonable value of \$40,000.

That defendant has paid plaintiff all the installments of the purchase price of said property and the

interest thereon as provided for in said contract entitled Exhibit "A," except the last installment thereof, to wit, \$28,500, and interest thereon at the rate of 6½% per annum from June 15th, 1907; and said last installment and interest are now due and payable to plaintiff.

That on the 18th day of December, 1907, plaintiff tendered to defendant a document purporting to be a deed conveying said property to defendant, and at the same time demanded the above-mentioned sum of \$28,500, and interest. That said 18th day of December, 1908, was a legal holiday. And that no further tender of a deed conveying title to the said property has been made by plaintiff to defendant; and defendant is informed and believes and on that ground alleges that no such tender has been made to any one else. [52]

That said Central Counties Land Company did on the 26th day of December, 1907, file in this court, in and for the city and county of San Francisco, an action in equity numbered 13,476, against Heinz Springe, plaintiff herein, and J. Dalzell Brown, defendant herein, for the determination of its right to hold said property, as aforesaid, and for judgment decreeing the conveyance to itself of said property, (a full and correct copy of the complaint in which action is hereunto annexed and made a part hereof and labeled Exhibit "E"); and said action is still pending and undetermined. And defendant is informed and believes and on the ground alleges that said Central Counties Land Company offered in its said complaint in said action and does still offer to

perform the covenants and conditions on its part and on the part of its assignors and of defendant, in the above-mentioned contracts, but that plaintiff has neglected and refused, and does still neglect and refuse to accept and comply with said offer and to perform the covenants and conditions on his part in said contract herein entitled Exhibit "A."

III.

Defendant further avers that said Central Counties Land Company is a necessary party to this action; and a complete determination of the controversy herein cannot be had without bringing in said Central Counties Land Company.

IV.

Defendant, as and for a further and separate cause of action, and in abatement of this action, avers as follows:

That said Central Counties Land Company did on the 26th day of December, 1907, file in this court in and for the city and county of San Francisco, an action in equity, numbered 13,476, against Heinz Springe, plaintiff herein, and J. Dalzell Brown, a defendant herein, for the determination of its right to hold the above-mentioned real property and for a decree ordering the [53] conveyance to itself of said property (a full and correct copy of the complaint in which action is hereunto annexed and made a part hereof labeled Exhibit "E"); that plaintiff has been served with summons and a copy of the complaint in said action, and said action is still pending and undetermined. And defendant is informed and believes and on that ground alleges that a determina-

tion of said action will more fully determine the same cause of action and the same rights of the parties hereto as are the subject of the action herein.

WHEREFORE defendant prays this Honorable Court to bring in as a party said Central Counties Land Company; to abate this action; to dismiss defendant with his costs; and for such other further judgment as shall be meet and proper in the premises.

EDWARD O. ALLEN,
Attorney for Defendant.

State of California,
City and County of San Francisco,—ss.

J. Dalzell Brown, being first duly sworn, deposes and says; that he is a defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated as on information and belief, and that as to those matters he believes it to be true.

J. DALZELL BROWN.

Subscribed and sworn to before me this 10th day of March, 1908.

[Seal] O. A. EGGERS,
Notary Public in and for the City and County of San Francisco, State of California. [54]

Exhibit "A" to Answer of Defendant Brown.

Lakeport, Cal., September 20, 1906.

In consideration of Thirty Five Hundred (\$3500) Dollars the receipt of which is hereby acknowledged, as payment on account of the purchase price herein provided for HEINZ SPRINGE of the County of

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Lake, State of California; hereinafter designated as the Seller, promises and agrees to sell to L. J. Shuman, or his assignee, hereinafter designated as the PURCHASER, for the sum of Fifty-Five Thousand (\$55,000) Dollars, upon the terms and conditions herein mentioned all the personal property described in Schedule "A" hereunto attached and hereby referred to and made a part hereof, and all that certain tract of land situate, lying and being in the County of Lake, State of California, commonly known as the Carson Rancho, and particularly described as follows, to wit:

The Northeast quarter; the Southeast quarter; the Southeast quarter of the Northwest quarter and the Northeast quarter of the Southwest quarter of Section 21; the South half of Section 22; the Southwest quarter of the Southwest quarter of Section 23; the Northwest quarter; the Southwest quarter of the Northeast quarter and the fractional North half of the Southwest quarter of Section 23; the fractional North half of Section 27; the fractional North half of Section 28; and the fractional East half of Section 29, lying East of slough; all in Township 15 North, Range 9 West, Mount Diablo Base and Meridian.

Excepting, however, the following described portion of Section 26 in said Township 15 North, Range 9 West, to wit:

The Southwest quarter of Northeast quarter, the East half of Northwest quarter, Lot 2, the East half of the Southwest quarter of Northeast quarter, and also a part of Lot 1, Commencing at the Northeast corner thereof, running thence West 10 chains, thence

South to the meander line of Clear Lake, thence [55] Southeasterly along said meander line to the Southeast corner of said Lot 1, and thence North to the place of beginning.

Also that certain tract of land situate in the County of Lake, State of California, and being Lots 3, 4, 9 and 12 of Section 6, Township 15 North, Range 8 West, M. D. M., containing about One Hundred and Seventy-eight (178) acres of land.

It being expressly understood that the Northeast quarter of Northeast quarter of said Section 21, Township 15 North, Range 9 West, M. D. M., containing 40 acres of land, and embraced in the above description, is unpatented land, but has been paid for to the State of California, in full, and that patent will be secured as soon as possible.

The Seller agrees to furnish an abstract of title covering the lands hereby agreed to be sold complete to date on or before December 15th, 1906. The purchaser is allowed thirty days after receipt of said Abstract within which to examine title. Objections to the title, if any, shall be reported to the Seller, in writing, within said period of thirty days, and if not so reported shall be deemed to have been waived. The Seller agrees to remove defects rendering the title unmerchantable and specified by the purchaser in his written report of objections; but if said defects (saving and excepting the securing of said patent), are not removed within a reasonable time, not to exceed ninety days, after the receipt by the seller of said written report the Purchaser at his option may insist upon the specific performance of the

Seller's agreement to sell, extend the time for the removal of said defects, or declare this agreement at an end, in which latter event the Seller agrees to return to him the sums of money herein receipted for and any further sums paid on account of said purchase price. But if the sale herein provided for is not consummated under the terms and conditions of the agreement, by reason of the failure of the Purchaser to [56] pay the balance of the purchase price when due as herein provided, then the sums of money paid the Seller on account of the purchase price and interest thereon shall be forfeited and retained by the Seller as liquidated damages, and the Seller shall be thereafter released from all further obligation in law and equity, to convey said lands, and may, at once, take possession thereof and re-enter the same.

The balance of the purchase price, the sum of Fifty-one Thousand Five Hundred (\$51,500) Dollars shall be paid as follows:

I. The sum of Thirteen Thousand (\$13,000) Dollars shall be paid on the 15th day of December, 1906. It is *understand* and agreed that this payment includes a payment of Five Thousand (\$5,000) Dollars on account of the Purchase price of the land above described, and Eight Thousand (\$8,000) Dollars as the purchase price of the stock and other personal property herein agreed to be sold.

II. The further sum of Five Thousand (\$5,000) Dollars shall be paid on the 15th day of March, 1907.

III. The further sum of Five Thousand (\$5,000) Dollars shall be paid on the 15th day of June, 1907.

IV. A final payment of Twenty-eight Thousand

Five Hundred (\$28,500) Dollars shall be paid on September 15th, 1907.

The delivery to the purchaser of a good and sufficient deed of grant, bargain and sale covering title to said above-described parcels of land and payment of said last installment of Twenty-eight Thousand Five Hundred (\$28,500) Dollars of the purchase price are concurrent conditions.

It is understood and agreed that all deferred payments shall bear interest from date until time of payment at the rate of six and one-half ($6\frac{1}{2}\%$) per cent per annum and that said interest shall be paid quarterly, commencing with the 15th day of December, 1906, and which said interest payments are as follows, to wit: [57]

The sum of Seven Hundred Ninety and $40/100$ (\$790.40) Dollars on December 15th, 1906.

The sum of Six Hundred Twenty-five and $62/100$ (\$625.62) Dollars on March 15th, 1907.

The sum of Five Hundred Forty-four and $57/100$ (\$544.57) Dollars on June 15th, 1907; and

The sum of Four Hundred Sixty-three $12/100$ (\$463.12) Dollars on September 15th, 1907.

It is understood and agreed that the Seller shall deliver possession of all the property herein agreed to be sold at the time of making the payment of Thirteen Thousand (\$13,000) Dollars on December 15th, 1906, but any loss or damage thereto after the date hereof, shall be at the risk of the purchaser. None of the said property hereafter shall be removed from said premises by said Seller, but he shall be permitted to use all necessary firewood for his own domestic

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purposes, and shall also, have the right to the milk from the cows now being milked on said Ranch, up to the 15th day of December, 1906.

The Purchaser agrees to pay the salary of the present foreman of said Carson Rancho (or should he leave such other foreman as may be selected by the Seller) the sum of Sixty (\$60) Dollars per month, from the date of this agreement until said 15th day of December, 1906.

It is agreed between the parties hereto that taxes for the present fiscal year commencing on the first day of July, 1906, shall be prorated between the parties hereto in proportion to the length of their several possessions of the land, that is to say, the Seller agrees to pay his *pro rata* of said taxes computed from the First Monday of March, 1906, up to the 15th day of September, 1906, and the Purchaser agrees to pay all the taxes after that date.

It is also understood and agreed that the Purchaser shall [58] hereafter bear the cost of necessary repairs, and of such improvements as to which he may consent.

The Seller agrees to pay portions of the property herein agreed to be sold to such persons as may be named by the Purchaser upon payment to the Seller of One Hundred and Fifty (\$150) Dollars per acre, if the tract so to be conveyed is situate in either of Sections 27, 28 or 29 and that part of Section 26 as hereinafter provided, or if the tract so to be conveyed is situate elsewhere, upon the payment of Ten (\$10) Dollars per acre; but it is expressly provided that the tracts of land so to be conveyed shall contain

at least One Hundred (100) acres each and that tracts shall only be sold and conveyed, in the following manner and parcels, to wit:

The First tract to be sold shall be as follows, to wit:

The South Half of Northwest quarter of Northwest Quarter; the West half of Southwest quarter of Northeast quarter of Section 26 also beginning at the North West corner of Lot One (1) of said Section 26, and running thence East Ten Chains, thence South to the meander line of Clear Lake, thence Northwesterly along said meander line to the South West corner of said Lot One (1), and thence North to beginning; Lot Four (4); and the South half of Northeast quarter of Northeast quarter of Section 27;

All being in Township Fifteen (15) North Range Nine (9) West, M. D. M. containing in all 106 acres, more or less.

THEREAFTER no tract or tracts shall be sold and conveyed in said Sections 27, 28 and 29, unless it be contiguous and adjoin to a tract of land already conveyed, and *much* contain at least 100 acres in each tract, and must be in compact parcels of even width and running back from the meander line of Clear Lake to the North line of said Sections 27, 28 and 29; that is to say, it is intended, that all of the lands situate in said Section 27 contiguous to said last above described tract and running to the [59] North line of said Section 27, shall next be sold before any other lands.

It is also agreed between the parties hereto that the Purchaser may take any payments or any portion of

any payments before they become due under the terms of this agreement; and that all payments made under the terms of this Contract are to be considered as being made on account of the payment then due, or if no payment is then due, on account of the payment next becoming due under the terms of this agreement; but it is expressly understood that the interest installments shall be paid in full as hereinbefore provided and that any payments made before *the* become due shall not affect or reduce said interest.

It is understood and agreed by and between the parties to this agreement that it is the intention of the Seller to sell and of the Purchaser to buy all of the real property and property rights of every kind and nature whatsoever owned by the Seller and situate in the County of Lake, State of California, excepting only the lands heretofore described as being excepted from the Carson Rancho and situate in said Section 26; and it is agreed that any real properties situate in the County of Lake owned by the seller shall be deemed to be and be covered by this agreement though said real properties are not specifically described herein.

Time is made the essence of these agreements.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals this 20th day of September, 1906.

Executed in triplicate.

HEINZ SPRINGE. (Seal)

L. J. SHUMAN. (Seal)

SCHEDULE "A."

All of the horses, cattle, hogs, farming implements, now situate and contained on the premises herein described, saving and excepting one horse Mont Bello.
[60]

Exhibit "B" to Answer of Defendant Brown.

KNOW ALL MEN BY THESE PRESENTS:

That for and in consideration of the sum of Ten Dollars in United States Gold Coin to him in hand paid, by J. DALZELL BROWN, receipt whereof is hereby acknowledged, L. J. SHUMAN does hereby assign, transfer and convey unto said J. DALZELL BROWN, ALL HIS RIGHT, TITLE AND INTEREST IN AND TO that certain contract and agreement entered into on the 20th day of September, 1906, between said SHUMAN and H. SPRINGE, which contract and agreement is hereto attached and made part hereof, and which said agreement relates to and affects certain property situate in the County of Lake, State of California, and more particularly described in said Contract.

IN WITNESS WHEREOF, said L. J. SHUMAN has hereunto set his hand and seal, this 20th day of September, 1906.

L. J. SHUMAN.

Exhibit "C" to Answer of Defendant Brown.

OPTION.

IN CONSIDERATION of the sum of One Thousand Dollars (\$1000) to me paid, the receipt whereof is hereby acknowledged, I, L. DALZELL BROWN, hereby grant unto CENTRAL COUNTIES LAND

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COMPANY, a California Corporation, or its assigns, the right or option to purchase within six months from the date hereof for the additional sum of Sixty Seven Thousand (\$67,000) Dollars all that property, containing seventeen hundred (1700) acres, in the County of Lake, State of California, in Township 15 North, Range 9 West, M. D. M. lying contiguously east of the westerly boundary line of the property sold to me, by assignment from L. J. SHUMAN on the part of HEINZE SPRINGE under a certain contract dated September 20th, 1906; payment of said amount to be [61] made as follows, to wit, namely the sum of Thirty Thousand Dollars (\$30,000) in United States Gold Coin, and the balance of Thirty Seven Thousand Dollars (\$37,000) in authorized debenture certificates of said Central Counties Land Company at par value to wit, \$500 each. At the time of and concurrently conditional with the payment of said amount in the manner aforesaid, I agree to deliver to the nominee of said Company a sufficiency grant, bargain, and sale deed conveying a good title to the above-described property, free and clear of all liens and incumbrances.

San Francisco, Cal., September 20th, 1907.

J. DALZELL BROWN.

Witness to the signature of J. Dalzell Brown:

EDWARD O. ALLEN.

Exhibit "D" to Answer of Defendant Brown.

OPTION.

In consideration of the sum of One Thousand (\$1000) Dollars, to me paid, the receipt whereof is

hereby acknowledged, I, J. DALZELL BROWN, hereby grant unto CENTRAL COUNTIES LAND COMPANY, a California Corporation, or to its assigns, the right or option, to purchase within six months from the date hereof for the additional sum of Sixty Four Thousand (\$64,000) Dollars, the remaining part of my property, containing Two Hundred and Fifty (250) acres, more or less, on Clear Lake, California, (sold to me by Heinz Springe under that certain contract dated September 20th, 1906, between said Springe and L. J. Shuman), not otherwise agreed to be sold to Central Counties Land Company under that certain option and agreement, dated September 20th, 1907, for [62] the sale of 1700 acres of said property; payment of said amount of \$64,000 to be made as follows, to wit: namely: Said Central Counties Land Company shall assume the satisfaction of all liens levied against said property in relation to the construction of certain improvements thereon; said company shall also within six months from date pay to me the sum of Twenty Thousand (\$20,000) Dollars in U. S. Gold Coin and at the same time shall execute and deliver a mortgage on said 250 acres and improvements covering the balance of said \$64,000 payable in two years and bearing interest at the rate of 6% net. Upon the payment of said amounts and the delivery of said mortgage within the period stated, and concurrently conditional therewith, I agree to deliver to the nominee of said Company a sufficient grant, bargain and sale deed, covering a good title to the above-described property, free and clear of all liens and incumbrances.

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San Francisco, Cal., December 14th, 1907.

J. DALZELL BROWN.

Witness to signature of J. Dalzell Brown:

EDWARD O. ALLEN. [63]

Exhibit "E" to Answer of Defendant Brown.

*In the Superior Court in and for the City and County
of San Francisco, State of California.*

CENTRAL COUNTIES LAND COMPANY (a
Corporation),

Plaintiff,

vs.

J. DALZELL BROWN and HEINZ SPRINGE,
Defendants.

Complaint in Equity.

Plaintiff, for cause of action, alleges as follows:

I.

That plaintiff is a corporation organized and acting under the laws of the State of California, and having its principal place of business in the City and County of San Francisco, in said State.

II.

That on the 20th day of September, 1906, defendant Springe entered into a contract with one L. J. Shuman (a full and correct copy of which contract is hereto attached and made a part hereof and labelled Exhibit "A") for the sale of that certain property situate in the county of Lake, State of California and described as follows, to wit:

The Northeast quarter; the Southeast quarter; the Southeast quarter of the Northwest quarter and the Northeast quarter of the Southwest quarter of

Section 21; the South half of Section 22; the Southwest quarter of the Southwest quarter of Section 23; the Northwest quarter; the Southwest quarter of the Northeast quarter and the fractional North half of the Southwest quarter of Section 26; the fractional North half of Section 27; the fractional North half of Section 28; and the fractional East half of Section 29; lying east of slough, all in Township 15 North, Range 9 West, Mount Diablo Base and Meridian.

Excepting, however, the following described portion of Section 26 in said Township 15 North, Range 9 West, to wit:

The Southwest quarter of Northeast quarter, the East half of Northwest quarter, Lot 2, the East half of the Southwest quarter of Northwest quarter, and also a part of Lot 1, commencing at the Northeast corner thereof, running thence West 10 chains, thence South to the meander line of Clear Lake, thence Southeasterly along said meander line to the Southeast corner of said Lot 1, and thence North to the place of beginning.

Also that certain tract of land situate in the County of [64] Lake, State of California, and being Lots 3, 4, 9, and 12 of Section 6, Township 15 North, Range 8 West, M. D. M. containing about One Hundred and Seventy Eight (178) acres of land.

III.

That on the 20th day of September, 1906, said L. J. Shuman assigned, transferred and conveyed to defendant, Brown, by an instrument in writing (a full and correct copy of which instrument is hereto

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attached and made part hereof and labeled Exhibit "B") all his right, title and interest in and to the above-mentioned contract.

IV.

That defendant Brown has paid the defendant Springe, all the installments on the purchase price of said property and the interest thereof as provided for in said contract, except the last installment thereof, to wit, the sum of \$28,500 and interest thereon at the rate of 6% per annum from June 15th, 1907; and that there is now due and owing to defendant, Springe, by defendant Brown, said sum of \$28,500 and interest as aforesaid.

V.

That defendant Brown entered into possession of said property under the terms of said contract on December 15, 1906, ever since has been and now is in possession thereof; and since that date has erected extensive improvements thereon, consisting of a villa surrounded by gardens and other buildings, all of the *reasonable of* \$40,000.

VI.

That on the 18th day of December, 1907, defendant Heinz Springe, by his attorney, Eugene W. Levy, at the city and county of San Francisco, tendered to the defendant J. Dalzell Brown, a document purporting to be a deed of said property to said L. Dalzell Brown, and at the same time demanded from said Brown the above-mentioned sum of \$28,500 and interest.

That said 18th day of December, 1907, was a legal holiday duly declared such by the Governor of the State of California.

That no further tender of a deed conveying title to the [65] above-described property has been made to defendant, Brown, by defendant, Springe, subsequent to said 18th day of December, 1907.

VII.

That on the 20th day of September, 1907, defendant, J. Dalzell Brown, entered into a contract with plaintiff (a full and *correct of* which contract is hereto attached, made a part hereof, and labelled Exhibit "C") for the sale of 1700 acres of the above-mentioned property.

VIII.

That on the 14th day of December, 1907, the defendant, L. Dalzell Brown, entered into a contract with plaintiff (a full and correct copy of which contract is hereby attached and made a part hereof and labelled Exhibit "D") for the sale of the balance of the above-mentioned property, containing about 250 acres.

IX.

That on the 23d day of December, 1907, plaintiff tendered to defendant, Brown, in the city and county of San Francisco, State of California, by its secretary, Edward O. Allen, thereunto duly authorized, a written offer of performance of the above-mentioned contracts of September 20, 1907, and December 14, 1907, respectively.

That then and there defendant, Brown, stated that he could not deliver to plaintiff a deed conveying a good title to the above-described property for the reason that he had not yet received a conveyance of said property from defendant, Springe.

Plaintiff furthermore is informed and believes and on that ground alleges that defendant Brown has not received a conveyance of the said property from defendant, Springe, for the reason that defendant, Brown, does not possess sufficient funds to pay the amount due said Springe under the first above-mentioned contract of sale. [66]

X.

That plaintiff is now ready and willing to perform its obligations under said contracts of September 20, 1907, and December 14th, 1907, with defendant Brown, to wit—to pay the sum of thirty thousand dollars (\$30,000) in United States gold coin and to deliver authorized debenture certificates of the Central Counties Land Company of the aggregate par value of \$37,000 on the former contract; to pay the sum of \$20,000 in United States gold coin; to execute and deliver a mortgage on 250 acres above mentioned and to assume the satisfaction of all liens and claims against said property in relation to the construction of certain improvements thereon, as provided for in the latter agreement. But the defendant *L. Dalzell Brown*, is unable to deliver a sufficient grant, bargain and sale deed, conveying a good title to the above-described property, free and clear of all liens and incumbrances, by reason of the fact that defendant, Springe, refuses to convey to said Brown the first above-described property.

WHEREFORE, plaintiff prays this Honorable Court to render its judgment ordering, adjudging and decreeing that plaintiff be substituted to all the interests of the defendant, *J. Dalzell Brown*, in and

to the property and contract first above mentioned;

Also ordering, adjudging and decreeing that defendant, Heinz Springe, convey said property to plaintiff, upon plaintiff rendering to said Heinz Springe the sum of twenty eight thousand five hundred (\$28,500) dollars and interest at the rate of $6\frac{1}{2}\%$ per annum from June 15, 1907, and also upon plaintiff paying to J. Dalzell Brown the sum of fifty thousand (\$50,000) dollars in United States gold coin less said \$28,500 and interest, also the debenture certificates of plaintiff of the aggregate par value of \$37,000, assuming the satisfaction of all liens and claims against said property in relation to the construction [67] of certain improvements thereon and executing and delivering a mortgage on the above-mentioned 250 acres covering the balance due under the above-mentioned contracts of September 20, 1907, and December 14, 1907.

And for such other and further judgment as shall be meet and proper in the premises.

(Signed) EDWARD O. ALLEN,
Attorney for Plaintiff, Central Counties Land Co.
State of California,
City and County of San Francisco,—ss.

Edward O. Allen, being first duly sworn, deposes and says: That he is the Secretary of the Central Counties Land Company, a corporation, plaintiff herein; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief and that as to those matters he believes it to be true.

(Signed) EDWARD O. ALLEN.

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Subscribed and sworn to before me this 26th day of December, 1907.

[Seal]

J. J. KERRIGAN,

Notary.

Exhibits "A," "B," "C" and "D" and part of this Exhibit "E" as originally filed, are the same as the foregoing Exhibits "A," "B," "C," and "D," respectively, attached to this Complaint.

[Endorsed]: By the Court. Ordered filed as Answer of Defendant, J. Dalzell Brown. Filed April 27th, 1908. Shafter Mathews, Clerk. [68]

Exhibit 3—Complaint in Intervention.

*In the Superior Court of the State of California, in
and for the County of Lake.*

No. 1879.

HEINZ SPRINGE,

Plaintiff,

vs.

J. DALZELL BROWN, JOHN DOE SIMMONS
and ALFRED WHITE (Hereby Sued by
Fictitious Names),

Defendants.

Complaint in Intervention.

Now comes the Central Counties Land Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the city and county of San Francisco in said State, and intervening in the above-entitled proceeding for its interest in, and to protect its ownership of and title to

the parcels of land described in the complaint of above-named plaintiff, on file in the above-entitled action, said Central Counties Land Company shows and alleges as follows:

I.

That on the 20th day of September, 1906, plaintiff entered into a contract with one L. J. Shuman (a full, true and correct copy of which contract is attached to and made a part of the answer of defendants, J. Dalzell Brown and defendants Symons on file in the above-entitled action and labeled Exhibit "A," which Exhibit "A" is hereby referred to and made a part hereof) for the sale to said Shuman of the property described in the complaint herein.

That on the 20th day of September, 1906, said L. J. Shuman assigned, transferred and conveyed to J. Dalzell Brown, by an instrument in writing (a full, true and correct copy of which instrument is attached to and made a part of the Answers [69] of defendants J. Dalzell Brown and defendants Symons, on file in the above-entitled action and labeled Exhibit "B," which Exhibit "B" is hereby referred to and made a part hereof), all his right, title and interest in and to said contract.

That on the 20th day of September, 1907, said J. Dalzell Brown entered into, with Central Counties Land Company, a corporation and intervenor herein, a contract (a full, true and correct copy of which contract is attached to and made a part of the answers of defendant J. Dalzell Brown and defendant Symons on file in the above-entitled action and labeled Exhibit "C," which Exhibit "C" is hereby re-

ferred to and made a part hereof) for sale of 1700 acres of the above-mentioned property.

That on the 14th day of December, 1907, defendant J. Dalzell Brown entered into, with said Central Counties Land Company, a corporation, and intervenor herein, a contract (a full, true and correct copy of which contract is attached to and made a part of the answers of defendant J. Dalzell Brown and defendant Symons on file in the above-entitled action and labeled Exhibit "D," which Exhibit "D" is hereby referred to and made a part hereof), for the sale of the balance of the above-mentioned property as described in plaintiff's complaint in the above-entitled action.

That on the 15th day of December, 1906, plaintiff let defendant J. Dalzell Brown into possession of the whole of said property and defendant J. Dalzell Brown, under and by virtue of said contract herein referred to as Exhibit "A," entered into and thereafter until February 1st, 1908, remained in complete and undisturbed possession of said property.

That on the 1st day of February, 1908, defendant J. Dalzell Brown let said Central Counties Land Company, a corporation and intervenor herein, into complete possession of said property, and said Central Counties Land Company ever since said date has been, and now is holding the same and claims the right to hold the same under and by virtue of the above-mentioned contracts, [70] and that said Central Counties Land Company holds possession of said property through its servants or employee, defendant Symons.

II.

Central Counties Land Company further avers and shows that Messrs. Albert B. Southard and John A. Black are necessary parties to this above-entitled action, and that a complete determination of the controversy in said action cannot be had without bringing in said Albert B. Southard and John A. Black; and said Central Counties Land Company further petitions this Court and asks that said Albert B. Southard and John A. Black be brought into the above-entitled actions as parties defendant and to that end Central Counties Land Company shows and alleges:

That Central Counties Land Company is informed and believes and therefore alleges the fact to be: That on the day of ———, 1908, said Albert B. Southard and John A. Black obtained a judgment against J. Dalzell Brown in the Superior Court of the State of California in and for the city and county of San Francisco for the sum of \$3709.05. That thereupon a writ of execution was issued to the sheriff of the county of Lake, State of California and said sheriff levied upon the property described in plaintiff's complaint on file in the above-entitled action and upon an execution sale by said sheriff, duly had according to law, said property was on the 7th day of February, 1908, sold to Messrs. Albert B. Southard and John A. Black and that thereafter a Certificate of Sale of Real Estate on Execution was duly issued to said Albert B. Southard and John A. Black, which said Certificate of Sale of Real Estate on Execution is still in full force and effect and is

still held by Albert B. Southard and John A. Black.

WHEREFORE, said Central Counties Land Company prays that an order be made by this Court to the effect that the summons and the complaint in the above-entitled action be amended by the addition of Central Counties Land Company, a Corporation, [71] and Albert B. Southard and John A. Black as defendants therein; and that plaintiff cause the said Central Counties Land Company and the said Albert B. Southard and John A. Black to be each duly served with a copy of the said amended summons and amended complaint and that said Central Counties Land Company and Albert B. Southard and John A. Black be allowed to plead to the complaint on file in the above-entitled action.

EDWARD O. ALLEN,

Attorney for Central Counties Land Co.

State of California,

City and County of San Francisco,—ss.

Edward O. Allen, being first duly sworn, deposes and says:

That he is the Secretary of the Central Counties Land Company, a corporation, intervenor herein; and that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

EDWARD O. ALLEN.

Subscribed and sworn to before me this 21st day of May, 1908.

[Seal]

A. K. DAGGETT,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: "Filed May 23, 1908. Shafter Mathews, Clerk. By B. J. Turner, Deputy Clerk."

[72]

Exhibit 4—Findings of Fact and Conclusions of Law.

*In the Superior Court of the State of California, in
and for Lake County.*

HEINZ SPRINGE,

Plaintiff,

vs.

J. DALZELL BROWN,

Defendant,

and

CENTRAL COUNTIES LAND COMPANY,

Intervenor.

Findings of Fact and Conclusions of Law.

This cause coming on regularly to be heard, on the twenty-fifth (25th) day of May, 1908, before the Court, sitting without a jury, a jury having been expressly waived, plaintiff appearing by Luther Elkins, Esq., and C. A. S. Frost, Esq., of the law firm of Galpin, Elkins & Frost, and Herbert V. Keeling, Esq., of counsel; defendant J. Dalzell Brown appearing by Edward O. Allen, Esq., his attorney; and Central Counties Land Company, intervenor herein, ap-

pearing by C. M. Crawford of the firm of Crawford & Crawford, and by J. B. Kennedy, Esq., representing Chas. S. Wheeler, Esq., and Edward O. Allen, Esq.; and said cause having been tried before the court, and the Court having considered the law and evidence, now finds the following facts:

FINDINGS OF FACT.

I.

On the twentieth (20th) day of September, 1906, plaintiff Heinz Springe was, ever since continuously has been, and now is, the owner of and seized in fee of the real property described in paragraph I of plaintiff's complaint on file herein, and the whole thereof. [73]

II.

On the said twentieth (20th) day of September, 1906, while plaintiff was so the owner and seized in fee of the said real property, as in finding I aforesaid, plaintiff made, executed, and delivered to one L. J. Shuman, the agreement in writing mentioned in paragraph II of the answer of defendant J. Dalzell Brown, on file herein, and marked Exhibit "A" annexed to this answer.

III.

Thereafter, and on the said twentieth day of September, 1906, said L. J. Shuman made, executed and delivered to said defendant, J. Dalzell Brown, the contract in writing, mentioned in paragraph II of the answer of said defendant, Brown, on file herein, and marked Exhibit "B" annexed to said answer.

IV.

Thereafter, and on the fourteenth (14th) day of December, 1907, said J. Dalzell Brown, delivered to said Central Counties Land Company, intervenor herein, two contracts in writing, executed by him, one dated September 20th, 1907, being the contract referred to in paragraph II of defendant J. Dalzell Brown's answer herein, and marked Exhibit "C" annexed to said answer, and another, dated on said 14th day of December, 1907, also referring to in said paragraph II of said answer of said defendant Brown, and marked Exhibit "D" annexed to said answer.

V.

From the 15th day of December, 1906, to and until the first (1st) day of February, 1908, said defendant, J. Dalzell Brown, was continuously in possession of the real property mentioned in finding I hereof, claiming to hold the same under and by virtue of said Shuman contract, dated September 20th, 1906.

VI.

On said first (1st) day of February, 1908, said defendant, [74] J. Dalzell Brown, surrendered possession of said real property, mentioned in finding I hereof, to said Central Counties Land Company, intervenor herein, and said Central Counties Land Company took possession of said real property on said first day of February, 1908, and ever since has been, and still is, in possession of said real property, claiming to hold the same under and by virtue of the said Shuman contract, dated September 20, 1906, said assignment thereof, dated September 20th, 1906,

from said Shuman to said J. Dalzell Brown, and said writings, dated September 20th, 1907, and December 14th, 1907, respectively, mentioned in finding IV hereof.

VII.

Neither said J. Dalzell Brown nor said Central Counties Land Company ever paid or offered to pay, or tendered, to said plaintiff, Heinz Springe, or to anyone for him, the last installment, due September 15, 1907, under the terms of said Shuman contract of September 20th, 1906, of the purchase price of the real property mentioned in said Shuman contract and in Finding I hereof, nor any part of said last instalment, but, on the contrary, both said defendant Brown and said Central Counties Land Company, intervenor, have wholly failed, neglected, and refused to pay said last installment or any part thereof.

VIII.

On the twenty-ninth (29th) day of October, 1907, said Heinz Springe, plaintiff, tendered a good and sufficient deed of said real property, mentioned in finding I hereof, and, also, in paragraph I of plaintiff's complaint herein, to said J. Dalzell Brown, and then and there demanded of said defendant, J. Dalzell Brown, the payment of the amount then due said Heinz Springe under the terms of said Shuman contract, dated September 20, 1906, and said defendant Brown then refused and neglected, and has ever since refused and neglected, and still refuses and neglects, to pay said amount, so due under the terms of said [75] Shuman contract, or any part thereof.

IX.

On the seventeenth (17th) day of December, 1907, said Heinz Springe, plaintiff, tendered a good and sufficient deed of said real property, mentioned in finding I hereof, and, also, in paragraph 1 of plaintiff's complaint herein, to said J. Dalzell Brown, and then and there demanded of said defendant, Brown, the payment of the amount then due said Heinz Springe under the terms of said Shuman contract, dated September 20th, 1906, and said defendant, Brown, then refused and neglected, and ever since has refused and neglected, and still refuses and neglects, to pay said amount, so due under the terms of said Shuman contract, or any part thereof.

X.

On the sixteenth (16th) day of January, 1908, and prior to the commencement of this action, said Heinz Springe duly demanded possession of said real property, mentioned in finding I hereof, from said J. Dalzell Brown, but said Brown, being then in possession of said real property, by his agent, refused and neglected to deliver up the possession of said real property, to plaintiff, and ever since has refused, and still refuses to deliver up the possession thereof to plaintiff.

XI.

Thereafter, and on the 16th day of January, 1908, said Heinz Springe commenced this action, and, also, on said last-mentioned day, caused to be filed and recorded in the office of the recorder of Lake County, California, a notice of the pendency of this action,

wherein the said real property, mentioned in finding I hereof, was described.

And from the facts so found, the Court deduces the following: [76]

CONCLUSIONS OF LAW.

1.

That said plaintiff, Heinz Springe, was, on the sixteenth (16th) day of January, 1908, ever since has been, and still is, the owner, and seized in fee, of the real property, and of the whole thereof, described in paragraph I of plaintiff's complaint herein, and mentioned in finding I hereof, and entitled to the possession of said real property, and of the whole thereof,

2.

That said Central Counties Land Company, intervenor herein, is not entitled to the relief prayed for in its complaint in intervention, filed herein, nor to any relief.

Dated Lakeport, California, May 26th, 1908.

M. S. SAYRE,

Judge of the Superior Court.

[Endorsed]: Filed May 26, 1908. Shafter Mathews, Clerk. By B. J. Turner, Deputy Clerk.
[77]

Exhibit 5—Judgment.

*In the Superior Court of the State of California in
and for Lake County.*

No. 1879.

HEINZ SPRINGE,

Plaintiff,

vs.

J. DALZELL BROWN,

Defendant,

and

CENTRAL COUNTIES LAND COMPANY,

Intervenor.

Judgment.

This cause coming on regularly to be heard on the twenty-fifth day of May, 1908, before the Court, sitting without a jury, a jury having been expressly waived, plaintiff appearing by Luther Elkins, Esq., and C. A. S. Frost, Esq., of the law firm of Galpin, Elkins & Frost, and Herbert V. Keeling, Esq., of Counsel; defendant J. Dalzell Brown appearing by Edward O. Allen, Esq., his attorney, and Central Counties Land Company, Intervenor herein, appearing by C. M. Crawford, of the law firm of Crawford & Crawford, and J. B. Kennedy, Esq., for Charles S. Wheeler, Esq., and Edward O. Allen, Esq., and said cause having been tried before the Court, and the Court having considered the law and the evidence, after the submission of said cause for its decision,

findings of fact and conclusions of law, in writing, have been filed herein by the Court.

IT IS ORDERED, ADJUDGED AND DECREED, that on the sixteenth (16th) day of January, 1908, the plaintiff, Heinz Springe, was, ever since has been and now is the owner in fee and entitled to the possession of the following described real property, and of the whole thereof, to wit:

All that certain tract of land, situate, lying and being in the county of Lake, State of California, commonly known as the Carson Rancho, and particularly described as follows, to wit: [78]

The Northeast quarter (NE. $\frac{1}{4}$); the Southeast quarter (SE. $\frac{1}{4}$); the Southeast quarter of the Northwest quarter (SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$) and the Northeast quarter of the Southwest quarter (NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$) of Section Twenty-one (21); the South half (S. $\frac{1}{2}$) of Section Twenty-two (22); the Southwest quarter of the Southwest quarter (SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$) of Section Twenty-three (23); the Northwest quarter (NW. $\frac{1}{4}$); the Southwest quarter of the Northeast quarter (SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$) and the fractional North Half (N. $\frac{1}{2}$) of the Southwest quarter (SW. $\frac{1}{4}$) of Section Twenty-six (26); the fractional North Half (N. $\frac{1}{2}$) of Section Twenty-seven (27); the fractional North Half (N. $\frac{1}{2}$) of Section Twenty-eight (28); and the fractional East Half (E. $\frac{1}{2}$) of Section Twenty-nine (29); lying East of Slough; all in Township Fifteen (15) North, Range Nine (9) West, Mount Diablo Base and Meridian;

Excepting, however, the following described por-

tion of Section Twenty-six (26) in said township fifteen (15) North Range Nine (9) West, to wit: the Southwest quarter of the Northeast quarter (SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$); the East half of Northwest quarter (E. $\frac{1}{2}$ of NW. $\frac{1}{4}$), Lot Two (2), the East half of the Southwest quarter (E. $\frac{1}{2}$ of SW. $\frac{1}{4}$) of Northwest quarter (NW. $\frac{1}{4}$), and also part of Lot One (1) commencing at the Northeast corner thereof, running thence West ten (10) chains, thence South to the meander line of Clear Lake, thence Southeasterly along said meander line to the Southeast corner of Lot One (1), and thence North to the place of beginning.

Also that certain tract of land situate in the county of Lake, State of California, and being Lots Three (3), Four (4), Nine (9) and Twelve (12) of Section Six (6), Township Fifteen (15) North, Range Eight (8) West, Mount Diablo Base and Meridian, containing about One Hundred Seventy-eight (178) acres of land; [79]

It is further ORDERED, ADJUDGED AND DECREED that plaintiff, Heinz Springe, have and recover of and from the defendant, J. Dalzell Brown, and, also, of and from Central Counties Land Company (a corporation), intervenor herein, the possession of the real property hereinabove described, and of the whole thereof, together with said plaintiff's costs and disbursements, amounting to \$——.

Dated May 26th, 1908.

M. S. SAYRE,
Judge of the Superior Court.

[Endorsed]: Filed May 26, 1908. Shafter Matthews, Clerk. By B. J. Turner, Deputy Clerk.

Service of the within answer to amended complaint is hereby admitted this 25th day of March, 1915.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Plaintiff.

[Endorsed]: No. 15,796. United States District Court, Northern District of California, Second Division. Power and Irrigation Company of Clear Lake, Plaintiff vs. Heinz Springe, Defendant. Answer to Amended Complaint. Filed Mar. 25, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [80]

At a stated term, to wit, the March term, A. D. 1916, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Wednesday, the 21st day of June, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,796.

POWER & IRRIGATION CO. OF CLEAR LAKE
vs.
HEINZ SPRINGE.

Minutes of Court—June 21, 1916—Order on Motion for Nonsuit.

The parties and the jury being present as heretofore, the trial was resumed. E. P. Vandercook was recalled and further testified on behalf of plaintiff and plaintiff introduced in evidence its exhibit marked No. 17 and rested. Defendant moved for a nonsuit on the grounds stated, which was argued and pending arguments the further trial was ordered continued to to-morrow morning at 10 o'clock, and the jury, after being duly admonished by the Court, were excused until that time. [81]

At a stated term, to wit, the March term, A. D. 1916, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Thursday, the 22d day of June, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,796.

POWER & IRRIGATION CO. OF CLEAR LAKE

vs.

HEINZ SPRINGE.

Minutes of Court—June 22, 1916—Order Granting Motion of Nonsuit.

The parties and the jury being present as hereto-

fore, the trial was resumed by the further arguments of counsel, at the conclusion of which the motion was submitted and being fully considered, it was ordered that said motion be and the same is hereby granted, to which ruling the plaintiff then and there duly excepted. Ordered that judgment be entered accordingly, with costs to the defendant, and that the jury be discharged. [82]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

No. 15,796.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,
Plaintiff,
vs.
HEINZ SPRINGE,
Defendant.

Judgment on Nonsuit.

This cause having come on regularly for trial on the 20th day of June, 1916, being a day in the March 1916, term of said Court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; Charles S. Wheeler, Esq., appearing as attorney for plaintiff and R. P. Henshall and Luther Elkins, Esqrs., appearing as attorneys for the defendant, and the trial having been proceeded with on the 21st and 22d days of June in said year and term and evidence having been introduced on behalf of plaintiff and the attorneys for the de-

fendant having, at the close of plaintiff's case, moved the Court for a judgment of nonsuit, and the Court, after hearing arguments and fully considering said motion, having ordered that said motion be granted and that a judgment of nonsuit be entered herein with costs to the defendant:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action; that judgment of nonsuit be and the same is hereby entered against said plaintiff herein, that defendant go hereof without day; and that said defendant do have and recover of and from said plaintiff his costs in this [83] behalf expended taxed at \$114.75.

Judgment entered June 22, 1916.

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

A True Copy. Attest:

[Seal] WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed June 22, 1916. Walter B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[84]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 15,796.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,
Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

**Engrossed Bill of Exceptions of Plaintiff to be Used
on Behalf of Plaintiff on Writ of Error to the
Circuit Court of Appeals of the United States
from the Judgment Entered Herein.**

BE IT REMEMBERED, that on the 20th day of June, 1916, this cause came on regularly for trial in its regular order on the calendar, Charles S. Wheeler, Esq., appearing as counsel for the Plaintiff, and R. P. Henshall, Esq., and Luther Elkins, Esq., appearing as counsel for the Defendant; and a jury having been impanelled and sworn, and opening statements by respective counsel for plaintiff and defendant having been made, the following proceedings were had:

The corporate existence of plaintiff was proven by Plaintiff's Exhibit 17, a certified copy of its articles of incorporation, which said exhibit is in words and figures as follows:

**Plaintiff's Exhibit 17—Certified Copy of Articles of
Incorporation of Power and Irrigation Com-
pany of Clear Lake.**

“STATE OF ARIZONA,
Office of the
Arizona Corporation Commission. [85]

United States of America,
State of Arizona,—ss.

The Arizona Corporation Commission does hereby
certify that the annexed is a true and complete tran-
script of the

ARTICLES OF INCORPORATION
OF
POWER AND IRRIGATION COMPANY OF
CLEAR LAKE

which were filed in the office of said Arizona Cor-
poration Commission on the 8th day of April, A. D.
1913, at 1:30 o'clock P. M., as provided by law.

IN TESTIMONY WHEREOF, The Arizona
Corporation Commission, by its Chairman, has here-
unto set its hand and affixed its Official Seal. Done
at the City of Phoenix, the Capitol, this 8th day of
April, A. D. 1913.

ARIZONA CORPORATION COMMISSION,

W. P. GEARY,
Chairman.

[Seal]

Attest: CHAS. A. SMITH,
Secretary.

**Articles of Incorporation of Power and Irrigation
Company of Clear Lake.**

KNOW ALL MEN BY THESE PRESENTS:

That we, the undersigned residents of the City of Phoenix, whose postoffice address is Phoenix, Arizona, have this day associated ourselves together for the purpose of forming a corporation under and pursuant to the laws of the State of Arizona, and for that purpose do hereby adopt Articles of Incorporation as follows:

FIRST. The name of the corporation shall be
**POWER AND IRRIGATION COMPANY OF
CLEAR LAKE.**

The principal place in which the business of said corporation is to be transacted within the State of Arizona is Phoenix, Maricopa County, and the corporation may establish branch offices at London, England; New York in the State of New York; San Francisco in the State of California and elsewhere, where meetings of the stockholders and directors may be held.

SECOND. The general nature of the business proposed to be transacted by this corporation is as follows, to wit:

(1) To purchase, acquire, lease, let, use, maintain and operate canals, aqueducts, reservoirs, tunnels, flumes, ditches and pipes for conducting or storing water for the use of individuals, corporations and incorporated cities or towns or for mining or other purposes; [86]

(2) To construct, purchase, acquire, lease, let, use, maintain and operate wharves, docks, piers, chutes, booms, ferries, bridges, by-roads, canals, ditches, dams, pondings, flumes, aqueducts and pipes for irrigation and supplying mines and farming neighborhoods with water for power or other uses;

(3) To drain and reclaim lands;

(4) To purchase, acquire, lease, let, use, maintain and operate roads, tunnels, ditches, flumes, pipes, and dumping places for working mines;

(5) To construct, maintain and operate by-roads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery or necessary to reach any property used for public or private purposes;

(6) To purchase, acquire, lease, let, use, maintain and operate canals, reservoirs, dams, ditches, flumes, aqueducts and pipes for supplying, storing and discharging water for or in connection with the operation of machinery for the purpose of generating and transmitting electricity for the supplying of mines, quarries, railroads, tramways, mills and factories with electric power; and also for the supplying of electricity to light or heat mines, quarries, mills, factories, incorporated cities, cities and counties, villages or towns; and also for furnishing electricity for lighting, heating, or power purposes, to individuals or corporations, together with lands, buildings and all other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity

for any of the purposes or uses above set forth; and also to purchase, acquire, lease, hire, construct, maintain and operate electric power lines, electric heat lines, and electric light, heat and power lines;

(7) To assume the obligations of other corporations, companies or persons, and to guarantee the payment of bonds, debentures, notes or other obligations of other corporations, companies or persons;

(8) To exercise the right of eminent domain in behalf of any of the public uses for which it is organized;

(9) To locate, purchase, acquire, lease, hire, buy, sell, hold, mortgage, dispose of, and deal in, water and water rights, water ditches, aqueducts, flumes, canals, reservoirs, dams, springs, buildings and improvements;

(10) To engage in the business of selling, distributing or delivering water for irrigation purposes or for domestic use;

(11) To acquire, purchase, buy, hold, sell, lease, exchange, mortgage and deal in, lands, tenements and hereditaments, and interest of any and all kinds in real estate;

(12) To build, grade, macadamize, and construct streets, roads and distributing plants, and to lay out and plat towns, and townsites, and to build and construct houses and improvements thereon;

(13) To generate, purchase and sell for domestic, private, and public use, electricity, water, gas and electric power, and [87] to carry on the general business of producing, buying, selling, leasing, distributing, and dealing in the same;

(14) To construct, purchase, acquire, hire and and lease, maintain and operate stores, machine shops, warehouses and factories, and to buy, sell, exchange, and deal in personal property of all kinds;

(15) To construct, purchase, acquire, hire, and lease landings, seawalls, and bulkheads of every kind and description; to buy, sell, construct and operate barges, electric and steam vessels and sailing vessels;

(16) To construct, purchase, hire, lease, acquire, conduct, operate and manage hotels, inns, resorts, hospitals and camps;

(17) To reclaim and fill in swamp and overflowed marsh and submerged lands, and to operate dredges, steam shovels, and other machinery for the said or any other purposes;

(18) To buy, sell, purchase, cut, mill, manufacture, and otherwise acquire and dispose of wood, timber, lumber, coal, oil, and other fuel, and to own, and operate, sawmills and wood, lumber and coal yards and oil lands;

(19) To purchase, own, hold and deal in, stock and shares of capital stock, debentures and bonds of other corporations and in securities of all kinds;

(20) To borrow money and to issue bonds, debentures, and notes therefor, and to secure the same by mortgage, pledge, hypothecation, or deed of trust of any or all of the property, rights, privileges and franchises of the corporation, or to secure the same in any or either of said ways;

(21) To purchase, acquire, own, hold, use and exercise franchises, patents, and patent rights, and

to license others to use patents and patent rights;

(22) To acquire, construct, purchase, buy, hold, sell, lease, exchange, mortgage and deal in oil lands, oil, coal lands, oil pipe lines, tramways, telephone and telegraph lines;

(23) To generate electricity, electric power and mechanical power by water, water power, or by coal, oil, gas or other fuel or device;

(24) To do and perform any and all other acts and things necessary, useful, or auxiliary to the main purposes of the corporation.

THIRD. The authorized capital stock of this corporation shall be One Million (1,000,000) Dollars, divided into Ten Thousand (10,000) shares of the par value of One Hundred (100) Dollars each. At such time as the Board of Directors may by resolution direct, said capital stock shall be paid into this corporation in cash, services, or by the sale and transfer to it of real or personal property for the uses and purposes of said corporation, in payment for which, shares of the capital stock of said corporation may be issued, and the capital stock so issued [88] shall thereupon and thereby become and be fully paid up and non-assessable, and in the absence of fraud in the transaction the judgment of the Directors as to the value of the property purchased or services rendered shall be conclusive.

FOURTH. The time of the commencement of this corporation shall be the date of the issuance to it by the Arizona Corporation Commission of a certificate of incorporation, and the termination thereof shall be twenty-five years thereafter with the priv-

ilege of renewal as provided by law.

FIFTH. The affairs of this corporation shall be conducted by a Board of Directors. The first Board shall be elected on the fifteenth day of April, 1913, and shall serve until the first annual Stockholder's Meeting, as hereafter provided, or until their successors are elected. Thereafter the Board shall be elected from among the stockholders at the annual Stockholder's Meeting to be held on the third Tuesday in April of each year.

SIXTH. The directors shall have power to adopt and amend By-Laws for the government of the corporation, to fill vacancies occurring in the Board from any cause, and to appoint an Executive Committee and vest said committee with all of the powers granted to the Directors by these Articles.

SEVENTH. The highest amount of indebtedness or liability, direct or contingent, to which this corporation is at any time subject shall be Six Hundred and Sixty-six Thousand (666,000) Dollars, which amount does not exceed two-thirds of the amount of the capital stock.

EIGHTH. The private property of the stockholders of this Corporation shall be exempt from corporate debts of any kind whatsoever.

NINTH. At any stockholders' meeting of this corporation stock may be voted by proxy.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 8th day of April, A. D. 1913.

FRED H. LARSEN.
M. A. RABBITT.

State of Arizona,
County of Maricopa,—ss.

Before me, Thos. J. Prescott, a Notary Public in and for said County and State, on this day personally appeared Fred H. Larsen and M. A. Rabbitt, to me known to be the persons who subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this eighth day of April, 1913.

[Notarial Seal] THOS. J. PRESCOTT,
Notary Public.

My commission will expire March 18, 1906. [89]

Filed in the office of the Arizona Corporation Commission this 8 day of Apr. A. D. 1913, at 1:30 P. M. at request of The Southwestern Securities & Investment Co., whose postoffice address is Phoenix, Arizona.

ARIZONA CORPORATION COMMISSION,
By W. P. GEARY,
Chairman."

It was admitted by counsel that from December 14, 1908, to the time of the commencement of this action, defendant had been continuously absent from the State of California and from the United States.

It was conceded to be admitted by the pleadings that on September 20, 1906, the defendant entered into an agreement with one L. J. Shuman for the sale of certain lands in Lake County, copy of which agreement was attached as an exhibit to the com-

plaint, and that on or about September 20, 1906, said L. J. Shuman transferred, assigned and set over, the said contract unto J. Dalzell Brown.

It was admitted that on or about November 10, 1906, defendant furnished to said J. Dalzell Brown an abstract of the record title to the real property referred to in said contract of sale.

Over objection of counsel for defendant, the abstract was then admitted in evidence and marked as Plaintiff's Exhibit 1.

Mr. WHEELER.—Before it (the abstract) is marked, I would like to call your Honor's attention to the following matters. On page 14 of the abstract, you will find that the United States issued a patent to Samuel Jones for certain of the property going to make up this Carson Rancho. You will find on page 15 of the abstract that Samuel Jones deeds to B. F. Harbine, A. Levy, and S. C. Hastings, trustees for the stockholders of the Bank of Lake, a corporation. No trust is declared in the instrument. [90]

The COURT.—I suppose it is delivered as security to the trustees of the bank for some loan.

Mr. WHEELER.—The abstract does not show.

The COURT.—Of course, the abstract needn't show, so far as that is concerned, if the instrument to which the record refers is made.

Mr. WHEELER.—But this is the instrument, as will appear here, that is, the effect of the instrument, it is a deed to these people, trustees for the bank; that is the way it reads.

Now on page 16 there appears this deed, B. F.

Harbine, A. Levy and S. Clinton Hastings, trustees for the stockholders of the Bank of Lake, not as trustees for the bank, to B. P. Hastings, and it is through that deed if at all, that the title is deraigned. They received the deed as trustees for the Bank of Lake; they deed from themselves, sign their individual names and acknowledge the deed, as the evidence later on will show, as trustees for the stockholders of the Bank of Lake.

There is also in that abstract, on pages 10 and 11, a deed from A. F. Tate and Frank D. Tunis to A. Levy, B. F. Harbine and S. Clinton Hastings, as trustees for the stockholders of the Bank of Lake, a corporation, and the terms of the trust are given as follows, on page 11:

“To have and to hold unto the said parties of the second part, and to their successors in trust for the uses and purposes hereinbefore specified, that is to say, to take, manage and control, all and singular the said lands, and the rents, issues and profits thereof, for the sole and exclusive use and benefit of the stockholders of said corporation the said Bank of Lake, and to sell and dispose of said lands, and any part thereof, when and upon such terms and in such quantities as to the said trustees may seem fit, and to apply and dispose of the proceeds of the sales thereof, and of all income from said lands, or the sales thereof, accruing to the uses and benefit as aforesaid of the said stockholders of said corporation, in such proportion to each of said stockholders, as his amount of

stock shall bear to the whole amount of stock therein provided, however, and it is expressly understood, that the said parties of the second part the said trustees, shall make no sale of the said lands or any part thereof, save with the concurrence and consent of all said trustees, manifested by their joining in the execution of the said lands or any part of the same is affected." [91]

I next call your Honor's attention to a patent on page 12, from the United States to Oliver Sprague, and on page 13, Oliver Sprague deeds to A. Levy, B. F. Harbine and S. C. Hastings, trustees for the Bank of Lake, not for the stockholders. Now again, the only way that this title comes out is through the deed acknowledged by these parties as trustees for the stockholders.

It was admitted that on or about December 6, 1906, J. Dalzell Brown reported to defendant in writing certain purported exceptions and objections to defendant's title to said real property, which said objections are contained in a letter addressed to L. J. Shuman, Lakeport, Cal., and signed by Gray & Cooper. Said letter was read in evidence and the attention of the court called to the second, third, seventh, and eleventh objections. Said letter is in words and figures as follows:

Letter, December 6, 1906, Gray & Cooper to Shuman.

Dec. 6, 1906.

Mr. L. J. Shuman,
Lakeport, Cal.

Dear Sir:

We have examined that certain abstract of title to the lands of Heinz Springe, Esq., commonly known as "Carson Rancho" and also "Hudson" and "Gillett" tracts, all being situate in the County of Lake, State of California, made by Lake County Abstract Company, Inc. and dated the 1st day of November, 1906, and containing pages numbered from 1 to 147 inclusive; and also that certain memorandum prepared by Herbert V. Keeling additional to said abstract.

We beg to report that as shown by said abstract and said additional memorandum, title to those certain parcels of land described in that certain agreement between Heinz Springe, Esq., therein designated as the seller, and L. J. Shuman, therein designated as the purchaser, and dated September 20, 1906, was on the date of said abstract, to wit, the 1st day of November, 1906, at 12 o'clock M. vested in Heinz Springe subject to the following exceptions and objections:

First. The property described in the deed shown on pages 2 and 4 of the abstract were at one time owned by Andrew J. Carson; there is in the chain of title (see Abst. page 8) a deed from one A. J. Carson. The identity of the grantor in the deed shown at page 8 with the grantee named in the deed shown

at pages 2 and 4 should be satisfactorily established.

[92]

Second. Title to the property described on page 13 of the abstract was deeded by Oliver Sprague, the then owner, to "A. Levy, B. F. Harbine and S. C. Hastings, trustees for the Bank of Lake." The terms of the trust are not set forth in the abstract. If in fact no trust was expressed in the instrument, that fact should be certified to; if on the other hand a trust was declared, the terms thereof should be set forth so that we can determine whether the property was thereafter properly conveyed by the trustees.

Third. Title to a considerable portion of the property under examination became vested in B. F. Harbine, A. Levy and S. Clinton Hastings, as trustees of the Bank of Lake. On page 16 of the abstract there is shown a deed executed by B. F. Harbine, A. Levy and S. Clinton Hastings apparently in their individual capacity. It is therefore objected that title to the property described on page 16 of the abstract is still vested in the persons named as trustees for the stockholders of the Bank of Lake.

Fourth. If however it appears upon further search that the deed last mentioned was properly executed by the trustees in their official capacity, it is objected that the description is erroneous in this, that the Township in which the property is located is given as "Township 13 N. R. 9 West M. D. M." A conveyance should therefore be obtained in any event from the individuals mentioned as trustees.

Fifth. The tracts of swamp and overflowed lands situate in Section 28, Township 15 North, Range 9

West, M. D. B. & M., were obtained from the State of California (abstract page 25) ; but the parcels of land firstly and secondly described in the patent shown on page 25 of the abstract do not appear to be contiguous; there is therefore in the northwest quarter of said Section 28 a small parcel of land which is not covered by the State patent.

Sixth. The lands described in page 28 of the abstract were patented by the State of California to a predecessor in interest of Mr. Springe, but there is no evidence showing that the lands were ever listed by the United States to the State of California; this evidence should be supplied.

Seventh. Title to most of the property under examination was at the time of his death vested in Robert P. Hastings; his estate was probated in the Superior Court of the City and County of San Francisco, State of California, and the decree of final distribution entered in that estate is shown on the abstract pages 30 and following; there is, however, nothing to show that the Court had any jurisdiction to make the decree of final distribution. Proceedings in the matter of the estate of Robert P. Hastings, deceased, taken in the Superior Court of the City and County of San Francisco, should be restored so that it will appear of record that the Court had acquired jurisdiction to administer the said estate. Title is therefore objected to on the ground that it does not appear of record that title has passed from Robert P. Hastings.

Eighth. If the said decree given and made in the Estate of Robert P. Hastings, deceased, was effective

to pass title, evidence should then be supplied that the distributee named in said decree, namely, Mary C. Hastings, thereafter married James Daniell of London, England.

The judgment obtained by the Banque Continentale de Paris in the foreclosure action brought against Mary Jane Daniell and others should be satisfied of record.

Ninth. The property is still subject to the lien of the mortgages shown at pages 91 and 93 and to the writ of attachment issuing out of the Superior Court of the City and County of San [93] Francisco in the action brought by Robert Morris vs. Mary Daniell.

NOTE. The mortgagees, Henry Lovegrove and Solomon Baron and said plaintiff Robert Morris were made parties defendant in the foreclosure suit brought by the Banque Continentale de Paris vs. Mary Jane Daniell above mentioned. It is probable that their rights were foreclosed in that proceeding, but the abstract as prepared does not show that jurisdiction of their persons was obtained or that their rights were in fact foreclosed. The proceedings in this action should be more fully set forth so that whether these rights are still outstanding may be determined.

Tenth. On page 88 is shown a mortgage from Mary Jane Daniell to Arthur Hepburn Hastie and others. On page 94 there is shown a satisfaction of mortgage which purports to satisfy the mortgage shown on page 88; this release is, however, signed by

A. H. Hastie, W. G. Blakeston, A. G. Probyn-Williams, A. J. Langdon and Hinton J. Bailey; the mortgagors are respectively Arthur Hepburn Hastie, William Graham Blakeston, Arthur Charles Probyn-Williams, George James London, and Hinton James Baily, copartners under the firm name or style of Messieurs Hastie. The identity of those signing the release with those mentioned in the mortgage should be established.

Eleventh. Title to the property described in deed shown on page 39 was vested at one time in Frederick Clay Tyndale Van Sandau; the deed on page 39 purports to run from Frederick Clay Tyndale Van Sandau and is signed E. C. T. Van Sandau. The identity of the person executing this deed with the grantee in the deed shown on page 37 should be established.

Twelfth. To that portion of the property excepted from the operation of the deed executed by Herbert V. Keeling and his wife to Heinz Springe, shown on pages 31 and 32 of the abstract, Heinz Springe has no title.

Thirteenth. To the northeast quarter of the northeast quarter of Section 21, Township 15 North, Range 9 West, no title is shown; we note, however, on the map a statement that a certificate of purchase has been issued on this parcel and on examining abstract we find that this parcel was conveyed to Frederick Clay Tyndale Van Sandau and by him to Herbert V. Keeling, and whatever title was conveyed to Mr. Keeling is still vested in him; if any title or right passed to Mr. Keeling by virtue of the deed shown on pages 39 and 40, a quitclaim deed from Mr. Keeling

should be obtained and the rights obtained under the certificate of purchase should be prosecuted to patent.

Fourteenth. In curing certain defects then existing to the title of the property under examination, deed was taken from Charles Foster Dio Hastings and his wife (see page 47). That deed fails to convey the northeast one-quarter of the southwest one-quarter of Section 21, Township 15 North, Range 9 West.

NOTE. This deed purports to convey the northeast one-quarter of the northwest one-quarter of said Section; this may be a stenographic error only; if not, quitclaim deed should be obtained from Charles Foster Dio Hastings covering this parcel.

Fifteenth. A portion of the property under search, to wit, the north half of the northwest quarter and the southwest [94] quarter of the northwest quarter of Section 26, Township 15 North, Range 9 west was at one time vested in William L. Benefiel; on page 106 is shown a deed executed by one W. L. Benefiel. The identity of said W. L. Benefiel with said William L. Benefiel should be proven.

Sixteenth. Title to a portion of the property under search was at his death vested in David Hudson (for description see page 109 of the abstract). Enough of the proceedings taken in the Superior Court of the County of Mendocino, State of California, in the Matter of the Estate of David Hudson, deceased, should be given to show that the Court had jurisdiction of the said Estate of David Hudson to make the decree shown on page 109.

Seventeenth. Assuming that the decree of final distribution in the matter of the Estate of David Hudson, deceased, shown on page 109 of the abstract was properly given and made, the identity of the grantor named in the deed shown at page 111 with Elbert Hudson, one of the distributees mentioned in the decree of final distribution in the matter of the Estate of David Hudson, deceased, shown at pages 108 and following of the abstract should be shown.

Eighteenth. The decree and judgment obtained in the Superior Court, County of Lake in the action brought by Zilphia A. Carly vs. R. J. Hudson should be satisfied on the docket.

Nineteenth. The identity of the grantor in the deed shown at page 123 with the grantee in the deed shown at page 122 should be established.

Twentieth. A portion of the property, to wit, the northeast quarter of the northeast quarter of Section 28, Township 15 North, Range 9 West, M. D. M., was patented by the United States of America to Peter S. Burk. There is in the chain of title (see abstract, page 125) a deed purporting to run from one Peter S. Burke to Charles W. Gillett; this deed is however signed P. S. Burke. The identity of the person executing this deed with the said patentee should be established.

Twenty-first. Title to that portion of the property under examination described on page 129 of the abstract became at one time vested in John W. Jones; on page 130 there is shown a deed from J. W. Jones. The identity of the grantor in this last-named deed

with the grantee in deed shown on page 129 should be established.

Twenty-second. Title to that portion of the property under search which is described on page 135 of the abstract was at the time of his death vested in one Charles W. Gillett. Heinz Springe makes title to this portion of the property through one Green Bartlett who became purchaser of the property at a sale had in the course of the administration of the estate of Charles W. Gillett, deceased. This sale was invalid and no title passed thereby. This sale is invalid for the following reasons:

1st: The petition for the order of sale does not contain the matters required by law; and

2nd: No valid order to show cause was ever given or made by the Court.

Note. See *Campbell vs. Drais*, 125 Cal. 253.

Decintha H. Gillett is the surviving wife and the sole devisee of said C. W. Gillett. The estate has not yet been distributed; but as soon as it is distributed, if the decree [95] of distribution carries the general omnibus clause, then a deed from Mrs. Gillett would cure this defect; a grant, bargain and sale deed should at this time be taken from Decintha H. Gillett.

Twenty-third. There however being a possibility that title did pass by the proceedings and that there are in existence facts of which the abstract gives us no notice, it is important that whatever title was obtained by said Green Bartlett be secured. The deed from Green Bartlett to John W. Jones shown at page 129 is in the chain of title but said deed was

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executed by Green Bartlett by R. W. Crump, his attorney in fact; the power of attorney was given some years previous and proof should be made that at the time of the execution of the deed, said Green Bartlett was alive and *sui juris*.

Twenty-fourth. The northeast quarter of the northeast quarter of Section 28, Township 15 North, Range 9 West was deeded to the State for delinquent taxes in 1881; redemption of this property should be made.

Very truly yours,

C. A. G. /BSA.

Plaintiff then offered in evidence a letter from Herbert V. Keeling, dated Lakeport, Cal., Feb. 19, 1907, which letter was received in evidence and marked Plaintiff's Exhibit 2. It was admitted that Mr. Keeling was preparing the abstract for defendant and had authority to write said letter. Said letter is in words and figures as follows:

**Plaintiff's Exhibit 2—Letter, February 19, 1907,
Keeling to Shuman.**

(Letterhead: Herbert V. Keeling, Attorney-
at-Law.)

Lakeport, Calif., Feb. 19, 1907.

Mr. L. J. Shuman,
Lakeport, Calif.

My dear Sir:

I am directed by Mr. Heinz Springe to give you formal notice, as vendee of his property on Clear Lake, that the objections to the title as made by Messrs. Gray and Cooper have been examined, and

that the same are not considered sufficient by him to render the title unmerchantable or obnoxious under the terms of his agreement with you.

Yours very truly,

HERBERT V. KEELING. [96]

Plaintiff then introduced in evidence letter from L. J. Shuman to Herbert V. Keeling, dated March 18, 1907, which letter was received in evidence and marked Plaintiff's Exhibit 3, and is in words and figures as follows:

**Plaintiff's Exhibit 3—Letter, March 18, 1907,
Shuman to Keeling.**

Lakeport, Cal., March 18, 1907.

Mr. Herbert V. Keeling,
Lakeport, Cal.

Dear Sir:

I duly received yours of February 19th, giving notice that Mr. Heinz Springe does not consider the objections to his title made by Messrs. Gray & Cooper sufficient to render the title unmerchantable or obnoxious under the terms of his agreement with me.

I beg to call your attention to the following provision of the contract between Mr. Springe and myself:

“The seller agrees to remove defects rendering the title unmerchantable and specified by the purchaser in his written report of objections; but if said defects (saving and excepting the securing of said patent) are not removed within a reasonable time, not to exceed ninety days, after the receipt by the seller of said written re-

port, the purchaser may at his option insist upon the specific performance of the seller's agreement to sell, extend the time for the removal of said defects, or declare this agreement at an end, in which latter event the seller agrees to return to him the sum of money herein receipted for and any further sums paid on account of said purchase price."

Under the option granted me I elect to insist upon the specific performance of Mr. Springe's agreement to sell. This agreement includes, you will note, an undertaking on the part of Mr. Springe "To remove defects rendering the title unmerchantable and specified by the purchaser in his written report of objections."

I therefore insist upon the removal of all the objections specified by myself in the written report heretofore delivered, which render the title to Mr. Springe's property unmerchantable.

I also give notice that I will extend your time to remove said defects until the first day of September, 1907. [97]

I also call your attention to the following provision of said contract:

"The delivery to the purchaser of a good and sufficient deed of grant, bargain and sale conveying title to said above-described parcels of land and payment of said last installment of twenty-eight thousand five hundred (\$28,500) dollars of the purchase price are concurrent conditions."

Kindly advise me whether your client's declination to remove the defect specified is final. If so, I hereby give notice that I will hold Mr. Heinz Springe liable for all damages suffered or occasioned by reason of his refusal to remove the said specified defects.

Yours very truly,

L. J. SHUMAN.

Plaintiff then introduced in evidence letter from Herbert V. Keeling to L. J. Shuman, dated Lakeport, Cal., April 13, 1907, which said letter was received in evidence and marked Plaintiff's Exhibit 4, and is in words and figures as follows:

**Plaintiff's Exhibit 4—Letter, April 13, 1907,
Keeling to Shuman.**

(Letterhead: Herbert V. Keeling, Attorney-at-Law.)

Lakeport, Cal., April 13, 1907.

L. J. Shuman, Esq.,
Lakeport, Cal.

Dear Sir:

In the matter of the objections made to the title to the lands of Heinz Springe, as contained in the report made by Messrs. Gray and Cooper, I would now advise you that Mr. Springe has finally decided to proceed and remove all such objections so far as he reasonably *do so*. He has accordingly instructed me to take up this matter, and to do all that may be required to remove the objections as soon as possible.

Yours very truly,

HERBERT V. KEELING.

Plaintiff then introduced in evidence letter from Herbert V. Keeling to Messrs. Gray & Cooper, dated Lakeport, Cal., April 16, [98] 1907, which said

letter was received in evidence and marked Plaintiff's Exhibit 5, and is in words and figures as follows:

**Plaintiff's Exhibit No. 5—Letter, April 16, 1907,
Keeling to Gray & Cooper.**

(Letterhead: Herbert V. Keeling, Attorney-at-Law.)

Lakeport, Calif., Apr. 16, 1907.

Messrs. Gray and Cooper,

Kohl Building,

San Francisco, Calif.

Gentlemen:

Mr. Heinz Springe, the owner of the Carson Rancho, has now directed me to proceed in the matter of clearing up the objections as made by you to the title of his lands. I understand that he has seen you personally in regard to these objections, and that you are willing to waive certain of them. The eighth objection he had crossed off from the list, and possibly there are others that do not need attending to. Kindly let me know just how matters stand so that I may proceed accordingly.

Yours very truly,

HERBERT V. KEELING.

Plaintiff then introduced in evidence copy of letter from Messrs. Gray & Cooper to Herbert V. Keeling (it being admitted that Messrs. Gray & Cooper signed the original thereof), dated May 7, 1907, which said letter was received in evidence and marked Plaintiff's Exhibit 6, and is in words and figures as follows:

**Plaintiff's Exhibit No. 6—Letter, May 7, 1907, Gray
& Cooper to Keeling.**

May 7, 1907.

Mr. Herbert V. Keeling,
Lakeport, Cal.

Dear Sir:

Your favor concerning the objections to Heinz Springe's title came duly to hand. Please pardon our delay in answering.

We realize, of course, that a number of our objections are quite formal and we have no doubt they can easily be met. For instance the objections based upon the fact that property was taken by a man in his full name and conveyed by him by an instrument which described him by his initials only. There is, of course, no presumption of identity of person by identity of initials, and we should have in these cases the affidavit of some person familiar with the facts to establish the identity of the grantee in one deed with the grantor in the other. [99]

The sixth, eighth and tenth objections are waived but we think that the other objections should be met in some satisfactory manner. The twenty-second objection is the most serious objection made.

We regret the necessity of urging these objections but will be glad to make compliance with our request that the defects noted be corrected as easy as possible.

We will also say that we are at all times open to conviction that any particular objection made is not

tenable and will be glad to discuss with you any of the objections you deem unsound.

Yours very truly,

G/W.

Plaintiff then introduced in evidence letter from Herbert V. Keeling to Edward O. Allen, dated Lakeport, Cal., June 24, 1907. Said letter was received in evidence and marked Plaintiff's Exhibit 7, and is in words and figures as follows:

**Plaintiff's Exhibit No. 7—Letter, June 24, 1907,
Keeling to Allen.**

(Letterhead: Herbert V. Keeling, Attorney-at-Law.)

Lakeport, Calif., June 24, 1907.

Edward O. Allen, Esq.,

Union Trust Building,

San Francisco, Calif.

Dear Sir:

I enclose herewith copy of my report upon the objections made by Messrs. Gray and Cooper to the title of the lands of Heinz Springe, Esq. I have sent the original contract to Messrs. Gray and Cooper, as we have been corresponding directly about the points of objection and thought it would save time to send it to them.

I leave on the 25th inst., for my vacation, and should you have occasion to write to me at any time during my absence, my address for the next two months will be Blyton Lodge, Catharine Road, Sutton, Surry, England.

Yours very truly,

HERBERT V. KEELING.

(Enc.)

Plaintiff then introduced in evidence letter addressed to Messrs. Gray & Cooper, signed by Herbert V. Keeling, dated Lakeport, Cal., June 19, 1907, said letter being an enclosure originally contained in Plaintiff's Exhibit 7, but now offered separately. Said letter was received in evidence and marked Plaintiff's Exhibit 8, and is in words and figures as follows: [100]

**Plaintiff's Exhibit No. 8—Letter, June 19, 1907,
Keeling to Gray & Cooper.**

Lakeport, Cal., June 19, 1907.

Messrs. Gray and Cooper,
Kohl Building,
San Francisco, Cal.

Gentlemen:

In the matter of the objections to the title of the lands of Heinz Springe, Esq., commonly known as "Carson Rancho," and also, "Hudson and Gillett" tracts, I would now report that I have met all objections as far as practicable. These objections are contained in your letter of the 6th day of December last, addressed to Mr. L. J. Shuman, and for convenience I treat the objections in the same order as set out in your report.

FIRST: This objection is met by affidavit of W. W. Greene, a long time resident of this county, and who knows Andrew J. Carson to be the same person as A. J. Carson. This affidavit is marked "Exhibit 1."

SECOND: No trust is declared in the deed made by Oliver Sprague to A. Levy, B. F. Harbine and S. C. Hastings, trustees for the Bank of Lake.

THIRD: The deed shown on page 16 of the abstract is signed by B. F. Harbine, A. Levy and S. C. Hastings, as shown therein, but the certificate of acknowledgment shows that they executed this deed as trustees of the Stockholders of the Bank of Lake, and in addition there is a ratification executed on behalf of the President and Secretary of said Bank. This certificate of acknowledgment and ratification is now set forth in full and marked "Exhibit 2."

FOURTH: The wrong township is described in the abstract on page 16, it being township 15 North Range 9 West, M. D. M., and not Township 13 North Range 9 West, M. D. M. This mistake was corrected in the office copy of the abstract but not in the original. I would ask, therefore, to kindly correct the abstract so as to remedy this apparent defect.

FIFTH: The tracts of Swamp and Overflowed Lands situate in Section 28, Township 15 North, Range 9 West, M. D. M., are not entirely contiguous, and their particular location is now shown on plat marked "Exhibit 3."

SIXTH: This objection is waived under your advices of May 7th, last.

SEVENTH: It has been impossible to obtain any of the proceedings in the matter of the estate of Robert P. Hastings, deceased, except the Decree of Distribution which appears of record in the office of the County Recorder of this County. I made enquiry from all parties who might be likely to have such records, including the attorneys for the estate, as well as the agent for the Hastings family. All of these records were destroyed in the San Francisco

fire last year and cannot be replaced. An exact entire copy of the decree as shown of record is now presented and marked "Exhibit 4," and I trust this will furnish a sufficient presumption that the Superior Court of the City and County of San Francisco obtained such jurisdiction over the estate to enable it to make such decree. [101]

EIGHTH: This objection is waived by your advices of May 7th, last.

NINTH: The foreclosure proceedings in the suit of the Bank Continentale de Paris vs. Daniell, et al., show that the mortgagees, Henry Lovegrove and Solomon Baron, and, also, the judgment creditor, Robert Morris, were foreclosed of all their right, title and interest, in and to the property by the decree of foreclosure rendered. These proceedings are now set up in extended form, and are marked "Exhibit 5."

TENTH: This objection is waived by your advices of May 7th, last.

ELEVENTH: This objection I have not yet been able to complete. I sent some while ago a further deed for execution by Frederick Clay Tyndale Van Sandau, but as he lives in Paris, France, it has not yet been returned to me. In any event I anticipate no difficulty in meeting this objection, and the deed will be forwarded to you as soon as it arrives.

TWELFTH: That portion of the property excepted from the operation of the deed executed by Herbert V. Keeling and wife, to Heinz Springe, is not a part of the lands contracted for and agreed to be sold.

THIRTEENTH: The only evidence of title owned by Mr. Springe to the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Section 21, Township 15 North, Range 9 West, is under Certificate of Purchase No. 4555 issued by the Register of the State Land Office to M. S. Sayre on November 7th, 1903. This Certificate was duly assigned by Mr. Sayre to Heinz Springe on September 20th, 1906, and both the certificate of purchase and assignment appear of record in the office of the County Recorder of the said County of Lake. In order to divest any title the writer may have in this forty acres I have now prepared a quit-claim deed which has been recorded, and is marked "Exhibit 6."

FOURTEENTH: The defect noted in the deed made by Charles Foster Dio Hastings and wife to Mary Jane Daniell is a clerical one, it having been corrected in the office copy of the abstract but not in the original. This deed conveys the NE. $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 21, Township 15 North, Range 9 West, and the description given in the Abstract as the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said Section, is erroneous and should be corrected.

FIFTEENTH: The identity of William L. Benefiel with W. L. Benefiel is now evidenced by affidavit of Decintha H. Gillett, marked "Exhibit 7."

SIXTEENTH: The proceedings in the estate of David Hudson, deceased, as taken in the Superior Court of Mendocino County, State of California, are now sufficiently given to show that the Court had jurisdiction of said estate to make the decree shown on page 109. These proceedings are under certificate

of Smith Donohoe & Company, a corporation, and are marked "Exhibit 8."

SEVENTEENTH: The identity of Elbert Hudson with E. Hudson is now shown by original affidavit of said Elbert Hudson marked "Exhibit 9."

EIGHTEENTH: The decree and judgment obtained in the [102] Superior Court of the County of Lake, in the action brought by Zilphia A. Carly against R. J. Hudson is satisfied by the original entry in the Clerk's Judgment Book as shown by "Exhibit 10."

NINETEENTH: The identity of William A. Black with W. A. Black is now shown by the original affidavit of Decintha H. Gillett, marked "Exhibit 11."

TWENTIETH: The identity of Peter S. Burke with P. S. Burke is now shown by original affidavit of Decintha H. Gillett, marked "Exhibit 12."

TWENTY-FIRST: The identity of John W. Jones with J. W. Jones is now shown by a further deed executed by John W. Jones to Heinz Springe, and which said deed has been duly recorded in the office of the County Recorder of the County of Lake. This deed is marked "Exhibit 13."

TWENTY-SECOND: This objection is met by the execution of a grant, bargain, and sale deed on behalf of Decintha H. Gillett, the surviving wife and sole devisee of C. W. Gillett, deceased, to Heinz Springe, and which deed has been duly recorded in the office of the County Recorder of Lake County. This original deed is marked "Exhibit 14." I, also, attach further probate proceedings in the matter of

the estate of C. W. Gillett, deceased, showing that a final decree of distribution was made, and which carried the general omnibus clause. These proceedings are marked "Exhibit 14a."

TWENTY-THIRD: The affidavit of C. M. Crawford meets this objection and shown that Green Bartlett was living at the time the deed was executed from him, by his attorney-in-fact to John W. Jones shown on page 129 of the abstract. The fact of Green Bartlett being living at this date is also in the knowledge of the writer. This affidavit is marked "Exhibit 15."

TWENTY-FOURTH: The tax sale noted has now been redeemed, as shown by certificate of redemption herewith marked "Exhibit 16," and which certificate of redemption has been duly recorded in the office of the County Recorder of the County of Lake. The Certificate of Redemption is marked "Exhibit 16."

The above practically disposes of all of the objections as made by you and I trust you will find them sufficient. It has entailed quite an amount of labor and travel to secure the various affidavits and other documents. I have left instructions to have the deed from Mr. Van Sandau forwarded at once to you upon its arrival here.

As already advised I shall be absent for the next two months but all communications addressed to my office will receive prompt attention, as I have made arrangements for carrying on my business while away. Should there be occasion to write to me direct during the months of July and August my address

will be Blyton Lodge, Catherine Road, Surbiton, Surry, England.

In the meantime, I am,

Yours very truly,

HERBERT V. KEELING. [103]

It was admitted by counsel for defendant that when Mr. Keeling went away on a certain vacation mentioned in one of the foregoing letters, he left Mr. H. B. Churchill in charge of his office and business and in charge of clearing up certain matters with regard to the title to the lands in question.

Plaintiff next offered in evidence a certain letter signed Lake County Title & Abstract Company, Incorporated, Herbert V. Keeling, Manager, by H. B. Churchill, Assistant Manager, to Messrs. Gray & Cooper, and dated June 27, 1907. This letter was received in evidence and marked Plaintiff's Exhibit 9, and is in words and figures as follows:

**Plaintiff's Exhibit No. 9—Letter, June 27, 1907,
Lake County Title & Abstract Co. to Gray
& Cooper.**

(Letterhead: Herbert V. Keeling, Attorney-at-Law.)

Lakeport, Calif., June 27, 1907.

Messrs. Gray and Cooper,

Kohl Building,

San Francisco, Calif.

Gentlemen:

I have this day received the proposed deed from Van Sandau to Heinz Springé but upon examining the deed I find that Mr. Van Sandau has failed to

acknowledge the same and I am, therefore, returning the deed to him for execution. This, of course, will necessitate a further delay and when the deed is returned to me I shall advise you.

Yours very truly,

LAKE COUNTY AND ABSTRACT COM-
PANY, INC.,

HERBERT V. KEELING,

Manager.

By H. B. CHURCHILL,

Asst. Man.

Plaintiff next offered in evidence a letter signed by H. B. Churchill addressed to Messrs. Gray & Cooper, dated August 7, 1907, under the letterhead of Herbert V. Keeling, which letter was received in evidence and marked Plaintiff's Exhibit 10, and is in words and figures as follows:

**Plaintiff's Exhibit No. 10—Letter, August 7, 1907,
Churchill to Gray & Cooper.**

Lakeport, Cal., August 7th, 1907.

Messrs. Gray and Cooper,

Kohl Building,

San Francisco, Cal.,

Gentlemen:

Re Springe Title.

I beg to advise you that I am now in receipt of the deed from Mr. Van Sandau to Mr. Springe, and I take it that [104] this should be recorded, however as I am not familiar with this whole proceeding I will await your advices in this detail.

Yours very truly,

H. B. CHURCHILL.

Plaintiff then introduced in evidence a copy of a letter dated September 3, 1907, addressed to Herbert V. Keeling, Esq., purporting to be signed by Gray & Cooper. This letter was admitted in evidence and marked Plaintiff's Exhibit 11, and is in words and figures as follows:

Plaintiff's Exhibit No. 11—Letter, September 3, 1907, Gray & Cooper to Keeling.

Sept. 3rd, 1907.

Herbert V. Keeling, Esq.,
Attorney at Law.
Lakeport, Cal.

Dear Sir:

Referring to your several favors of recent date, we beg to reply as follows:

Re MARINER TITLE—Objection #3.

Certainly the evidence adduced by you in connection with this matter is persuasive, but we regret that it is not record evidence, and if Agnes Meggat will not quit-claim the property we see no other way of clearing the record than by a suit to quiet title.

Re OLIVE C. TAYLOR—Abstract #563—Objection #2.

With reference to the trustees elected to hold, rent or sell real estate for the Bank of Lake, we beg to observe that, so far as we know, the California Courts have not sanctioned the appointment of such committees by Boards of Directors of corporations. The corporate powers are vested in the Board of Directors and must be exercised by that Board.

Hence it will be necessary to obtain the quit claim of the Bank. You will note the same objection arises in the Springe abstract and the quit claim of the bank will likewise have to be obtained in that matter.

Re L. A. G. STONE—Abstract #552—Objection
#2.

If the corporate seal of the California Agricultural and Improvement Association is affixed to the deed, a copy of which is enclosed in your favor of August 23rd, we will waive this objection.

Re SPRINGE TITLE—Abstract #494.

(1) Objection #3. To clear this matter we suggest that the quit claim of the Bank of Lake be obtained covering the property described on page 16 of the abstract.

(2) Objection #7. Advantage should be taken of Section 1 of Chapter 55 of the Statutes passed at the special session of the Legislature of 1906, thereby making the decree a record of the Superior Court of San Francisco County. Until this is done, we do not believe that there is sufficient record evidence of Mr. Springe's title.

Very truly yours,

A/E. [105]

The truth of certain allegations contained in the answer on file in this action, at page 16 thereof, was then admitted by plaintiff. These allegations are as follows:

That thereafter, on or about the 12th day of September, 1907, the said Brown, at the in-

stance and request of defendant, waived in writing a tender by defendant of a deed of the said premises on the 15th day of September, 1907 as called for by said agreement Exhibit "A."

Said Brown did sign and deliver to the defendant such a waiver, which is in words and figures following: "San Francisco, Cal., September 12, 1907. Mr. Heinz Springe, care of Eugene Levy, Esq., San Francisco, Cal. Dear Sir: With reference to the contract for purchase and sale entered into between yourself and L. J. Shuman, wherein you agreed to convey your Lake County property, with certain exceptions, to Mr. Shuman, or his assignee, I beg to confirm the statement already made that I am Mr. Shuman's assignee; I understand that Mr. Springe is now in Paris; that he has signed and acknowledged a deed conveying the property described in the contract with Mr. Shuman to the California Industrial Company, and that this instrument is now in San Francisco; and that Mr. Springe has in San Francisco no attorney in fact. In confirmation of the understanding reached between Mr. Levy and Mr. Gray, I hereby waive the production of a deed from Mr. Springe to myself on the day specified in the contract between yourself and Mr. Shuman, the understanding between us being that you will with all diligence cause to be delivered to me upon payment of the balance of the pur-

chase price due a proper deed conveying the property under consideration to myself.

Respectfully yours,

(Signed) J. DALZELL BROWN."

Plaintiff then introduced in evidence a copy of a letter sent by Charles A. Gray of the firm of Gray & Cooper, dated September 12, 1907, and addressed to Eugene Levy, attorney and agent for the defendant. This letter was received in evidence and marked Plaintiff's Exhibit 12, and is in words and figures as follows:

Plaintiff's Exhibit No. 12—Letter, September 12, 1907, Gray & Cooper to Levy.

Sept. 12th, 1907.

Mr. Eugene Levy,
2318 Clay Street,
San Francisco, Cal.

Dear Sir:

In accordance with the understanding reached the other day, I have obtained from Mr. Brown a writter waiver of the production of a deed from Mr. Springe on the specified day mentioned in the agreement between Mr. Springe and Mr. Shuman.

Our understanding is that you will with all diligence obtain from Mr. Springe a deed conveying the [106] property to Mr. Brown, Mr. Shuman's assignee.

Yours very truly,

A/E.

Plaintiff then introduced in evidence a letter admitted to bear the signature of Eugene W. Levy,

addressed to Mr. Gray, dated September 14, 1907. This letter was received in evidence and marked Plaintiff's Exhibit 13, and is in words and figures as follows:

Plaintiff's Exhibit No. 13—Letter, September 14, 1907, Levy to Gray.

(Letterhead: Eugene W. Levy, Attorney and Counsellor at Law, 1424 Gough Street.)

San Francisco, Sept. 14, 1907.

My dear Mr. Gray:

I am in receipt of your esteemed favor of the 12th inst., enclosing written waiver of Mr. J. Dalzell Brown, for which I thank you. I will do my best to obtain the deed at the earliest possible day.

Yours very truly,

EUGENE W. LEVY,

Chas. A. Gray, Esq.,
Kohl Building.

Plaintiff next accepted what he characterized to be an admission contained in the original answer on file herein, bearing the verification of the defendant. The allegations relied upon as an admission appear in paragraph 9 of the answer and are in words and figures as follows.:

That on or about the 10th day of December, 1907, this defendant who was then residing in Paris, France, came to California to determine what action should be taken by him to enforce the said contract of sale of September 20, 1906, and to protect the said real property therein described.

While plaintiff conceded that the foregoing allegation had been stricken from the answer, counsel for plaintiff offered [107] the foregoing not as an admission contained in the pleading, but as an admission against interest, contending that the statement contained therein with regard to enforcing this contract was a recognition of its existence on December 10, 1907.

Plaintiff then read in evidence the following allegations contained in the answer to the amended complaint, in paragraph 2 of page 24, which were characterized by him as an admission, and which are in words and figures as follows:

That on the 14th day of December, 1907, the said J. Dalzell Brown, made and entered into with Central Counties Land Company a corporation organized and existing under and by virtue of the laws of the State of California, a contract for the sale of 1700 acres of the lands described in said sales contract of September 20, 1906, a copy of which agreement is as follows, to wit:

“OPTION.

IN CONSIDERATION of the sum of One Thousand Dollars (\$1000) to me paid, the receipt whereof is hereby acknowledged, I, L. DALZELL BROWN, hereby grant unto CENTRAL COUNTIES LAND COMPANY, a California Corporation, or its assigns, the right or option to purchase within six months from the date hereof for the additional sum of Sixty Seven Thousand (\$67,000) Dollars all that property, containing seventeen hundred (1700)

acres, in the County of Lake, State of California, in Township 15 North, Range 9 West, M. D. M., lying contiguously east of the westerly boundary line of the property sold to me, by assignment from L. J. SHUMAN, on the part of HEINZ SPRINGE under a certain contract dated September 20th, 1906; payment of said amount to be made as follows to wit: namely the sum of Thirty Thousand Dollars (\$30,000) in United States Gold Coin, and the balance of Thirty-Seven Thousand Dollars (\$37,000) in authorized debenture certificates of said Central Counties Land Company at par value, to wit, \$500 each. At the time of and concurrently conditional with the payment of said amount in the manner aforesaid, I agree to deliver to the nominee of said Company a sufficiency grant, bargain and sale deed conveying a good title to the above described property, free and clear of all liens and incumbrances.

San Francisco, Cal., September 20th, 1907.

J. DALZELL BROWN.

Witness to the signature of J. Dalzell Brown.

EDWARD O. ALLEN." [108]

It appears from the record that the following colloquy took place:

Mr. WHEELER.—Gentlemen, I offer to make the following admission, which may expedite matters, and see if you can accept it in this form: I offer to admit it as follows: That on the 17th day of December, 1907, at the city and county of San Francisco, the defendant Springe, caused a deed, an instrument sufficient in form, to convey the property here in question; I say sufficient in form without any admis-

sion as to the title, to be offered to J. Dalzell Brown, at a time when Brown was confined in the city prison in the city and county of San Francisco.

Mr. HENSHALL.—No.

Plaintiff then made an admission of the allegation contained in paragraph 19 of defendant's answer, page 20 thereof, as follows:

That thereafter, on the 16th day of January, 1908, at the County of Lake, State of California, this defendant brought an action herein as plaintiff against the said J. Dalzell Brown in the Superior Court of the said County of Lake, said State of California, said action being entitled, "In the Superior Court of the State of California, in and for the County of Lake, Heinz Springe, Plaintiff vs. J. Dalzell Brown, John Doe Simons and Alfred White (hereby sued by fictitious names), Defendants," same being Superior Court No. 1789, said action being an action in ejectment against the said J. Dalzell Brown and certain other persons to eject the said J. Dalzell Brown and said other persons from the possession of the real property described in said sales contract of date September 20, 1906, and for the possession of said real property.

That appended hereto is a copy of said defendant's complaint in ejectment in said last mentioned action, which copy of complaint is marked "Exhibit 1," and by reference made a part of this answer.

Plaintiff then introduced in evidence said complaint in ejectment, which said complaint is attached to defendant's answer herein as Exhibit 1 thereof, and is hereby referred to and made a part hereof.

[109]

Plaintiff then admitted the truth of the following allegation contained in paragraph 20 of the answer, said paragraph appearing at page 21 thereof:

That thereafter, on or about the 27th day of April, 1908, said J. Dalzell Brown appeared in said last mentioned action by his attorney at law, Edward O. Allen, the purported assignor of the plaintiff herein, and filed his verified answer in said action, a copy of which answer is hereto attached, marked "Exhibit 2" and by reference made a part of this answer.

Plaintiff then introduced in evidence said answer in said ejectment suit, which said answer is attached to defendant's answer herein as Exhibit 2 thereof, and is hereby referred to and made a part hereof.

Plaintiff then introduced in evidence an assignment of J. Dalzell Brown to Edward O. Allen, and an assignment from Edward O. Allen to plaintiff herein. Said two assignments were bound in one cover and were marked Plaintiff's Exhibit 14, which said exhibit is in words and figures as follows:

**Plaintiff's Exhibit No. 14—Assignment, April 24,
1913, Allen to Power and Irrigation Co. of Clear
Lake, etc.**

ASSIGNMENT.

KNOW ALL MEN BY THESE PRESENTS:
That the undersigned J. DALZELL BROWN, in consideration of the sum of Ten Dollars U. S. Gold Coin, the receipt whereof is hereby acknowledged, does hereby assign, transfer and set over unto EDWARD O. ALLEN, of the City and County of San Francisco, State of California, all his right, title and interest whatsoever in, to and under that certain agreement entered into on the 20th day of September, 1906, between Heinz Springe and L. J. Shuman for the sale of certain real property situate in the County of Lake, State of California, commonly known as the "Carson Rancho," all the right, title and interest of said Shuman in which said agreement having been assigned, transferred and conveyed to the undersigned by said Shuman on said 20th day of September, 1906; also all rights in and to any money paid under said tract, including all rights arising from the making of any payments and to the recovery back of the money so paid; also all rights to recover any money or moneys or damages from said Heinz Springe and belonging to said J. Dalzell Brown.

IN WITNESS WHEREOF said J. Dalzell Brown

has hereunto set his hand and seal this 28th day of May, A. D. 1908.

J. DALZELL BROWN.

Witness:

H. B. ODGERS. [110]

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, Edward O. Allen, the assignee mentioned in the within and foregoing assignment, for and in consideration of the sum of one dollar to him in hand paid, receipt whereof is hereby acknowledged, has sold, assigned, transferred and set over, and does by these presents sell, assign, transfer and set over, unto POWER AND IRRIGATION COMPANY OF CLEAR LAKE, an Arizona corporation, the above and foregoing assignment, and any and all rights accrued or accruing thereunder.

IN WITNESS WHEREOF, I have hereunto set my hand this 24th day of April, 1913.

EDWARD O. ALLEN.

Witness:

CHARLES S. WHEELER.

The authenticity of the signatures subscribed to the foregoing assignments was admitted by plaintiff.

Plaintiff introduced in evidence the findings of fact and conclusions of law in said ejectment suit entitled *Heinz Springe vs. J. Dalzell Brown et al.*, which said findings are attached to defendant's answer herein as Exhibit 4 thereof, and which said findings are hereby referred to and made a part hereof.

Plaintiff then admitted the truth of the allegation contained in paragraph 23, at page 22 of the answer, said allegation being in words and figures as follows:

That thereafter, on the 26th day of May, 1908, there was duly made and entered in said ejectment suit the judgment of said last-mentioned Court in said action, a copy of which judgment is hereto attached, marked Exhibit 5 and by reference made a part hereof. That said judgment was duly given and made against the defendants therein named, including the said defendant, J. Dalzell Brown, one of the assignors of the plaintiff herein. The said judgment has not been set aside, modified or reversed, and no appeal has been taken therefrom, and that the same remains in full force and effect.

It was then admitted by defendant that in connection with the foregoing judgment, no motion for a new trial was ever made and no appeal from said judgment was ever taken. Defendant would not [111] concede, however, that there was never a stay of proceedings under said judgment.

Plaintiff then introduced in evidence said judgment in said ejectment suit, which said judgment is attached to defendant's answer herein as Exhibit 5 thereof, and is hereby referred to and made a part hereof.

With the consent of the defendant, plaintiff then introduced in evidence a copy of a letter dated June 2, 1908, addressed to Heinz Springe, the original

having been signed by Edward O. Allen. Said letter was received in evidence and marked Plaintiff's Exhibit 15, and is in words and figures as follows:

**Plaintiff's Exhibit No. 15—Letter, June 2, 1908,
Allen to Springe.**

June 2nd, 1908.

Mr. Heinz Springe,
c/o Messrs. Galpin, Elkins & Frost,
Metropolis Bldg., City.

Dear Mr. Springe.

I have just written to Mr. J. W. Symons, our agent and overseer who has been occupying your property on Clear Lake, to deliver possession thereof to you whenever you ask for the same; that is in pursuance of the judgment recently rendered in the ejectment suit and is of course subject to any of the rights of this Company and of J. Dalzell Brown arising from the contract of sale of the property, and to appeal from the judgment.

May I presume to recommend Mr. Symons as a desirable overseer or foreman? We have found him very capable and trustworthy and are perfectly satisfied that he has taken the best care of the property under existing circumstances; his pay has been \$75.00 per month and food supplies.

Mr. Symons has also brought to my attention the fact that certain persons are renting the property for pasturage. I submit that such rental should inure to us until the date of our quitting possession, although I have authorized Mr. Symons to arrange this matter with yourself.

With best regards, I beg to remain,

Yours very truly,

Secretary.

It was conceded by the defendant that they had received possession of the real property in question, which was covered by the agreement between Shuman and Springe, on the 4th day of June, 1908, [112]

Testimony of E. P. Vandercook, for Plaintiff.

E. P. VANDERCOOK, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination.

My name is E. P. Vandercook. I was dealing principally in real estate in the years 1906, 1907, and 1908. I am familiar with and had dealings or transactions in real property situated about the borders of Clear Lake in the years 1906, 1907 and 1908. I commenced to deal in real estate in 1886 and followed it very closely until 1908, very closely; in fact it was my principal business during those years. I have bought and sold real estate in Alameda County, city of Oakland, in Lake County and various other counties of the State of California. I have negotiated transactions that have involved very large sums of money and I have had a great many small transactions as well. I have acted as expert for the City of Oakland in its water litigation and also for the railroad commission on the question of land values.

I have been familiar since the early part of 1905 or the latter part of 1904 with the property known

(Testimony of E. P. Vanderecook.)

as the Heinz Springe property, which is concerned in this litigation. I am familiar with the improvements that were placed on this property in the year 1907, or thereabouts, by J. Dalzell Brown. I saw these improvements in the years 1907 and 1908, after the work upon the property by Brown had ceased. I am familiar with land values in Lake County on or about the 4th day of June, 1908. The improvements placed upon the Heinz Springe property by J. Dalzell Brown added more to the value of this land than their actual cost. I would say, in dollars and cents, that the improvements added approximately \$60,000 to the value of the property.

In the early part of 1907 I was a stockholder in and actively engaged in securing properties around Clear Lake for the Central Counties Land Company, and in the latter part of 1907 I was appointed manager of the corporation. I held this position [113] in December, 1907, down to and including the 4th day of June, 1908. I recall the circumstances under which two options were obtained from J. Dalzell Brown for the purchase by the Central Counties Land Company of the property here in question. They were obtained at my suggestion and instigation. Although one of the options is dated at an earlier date—September, I think it is—both were actually made in December, 1907.

Cross-examination.

I have a little stock in the plaintiff corporation at this time, although I hold no office therein.

(Testimony of E. P. Vandercook.)

As I have said, the so-called Brown mansion on this property added about \$60,000 to its value. It was a concrete and rubble, or stone and concrete, house of Spanish style, with an open patio in front enclosing a large oak tree. It was for residential and social purposes very largely. It was not a farm house. It was a villa capable of being used at all times of the year. The ranch where the mansion is situated has been used mostly for stock-raising. There is a vineyard of some extent, approximately sixty or eighty acres, a little orchard, and some general farming, but the ranch is used chiefly for stock-raising. Nevertheless I believe that a summer villa of this millionaire type of mansion added \$60,000 to the property for the following reason: There was no building or improvements on the lake that was comparable to it in any way. It aroused great interest in that section of the county. It was something that we in our work in connection with the Central Counties Land Company had been very anxious to have there, in looking forward to the time when we would be able to consummate our plans and subdivide the properties around the lake. We were very anxious to attract capital.

I have not been there for three or four years, but at the time that work was stopped I understood it was within about \$3,000 [114] of being completed. It was practically completed during 1907, but it has not led to similar improvements in that vicinity of any consequence. "The improvements I have not in mind at the present time, but" it was

(Testimony of E. P. Vandercook.)

a very large structure of two stories and must have had something like twenty-five or possibly thirty rooms. It was intended for entertainment and home life—sociability. It was very cleverly and completely designed and very highly estimated by everybody that examined it, as far as my personal contact with it went. It had a tile roof, hardwood floors generally throughout, and, I think, some maple downstairs.

Lakeport is 19 miles by the shortest wagon road, but by the ordinary stage road it is something like 24 miles. This mansion is, perhaps, in an air line, about 7 miles across the lake from Lakeport. If they utilized the bridge which the company built across from Rodman's Point to the Springe Ranch, the distance would be, perhaps, a little over 30 miles from the ranch to the railroad. In the winter time what was called the Lake Road was practically impassable. That was a road which for a part of the distance ran right along the lake shore and it was generally in the winter season overflowed by the high water of the lake. At that time it was necessary to make a detour and go around by Upper Lake. The roads were rather poor at that time; from Upper Lake to the ranch the roads were in fair condition. At the time we had the toll-road we kept it in very passable condition and at other times it has been very rough. I have never known of the toll-road being closed, nor have I known of its being closed while I was connected with the matter except when some

(Testimony of E. P. Vandercook.)

slide would occur which would temporarily block traffic.

The house built by J. Dalzell Brown was intended by him for his own use. There are not many inhabitants in all Lake County; that is one of its charms; but this particular spot where [115] this house was located is a very beautifully timbered and very attractive spot; one of the most attractive places on the lake. The mansion is quite near—I suppose within five hundred or six hundred yards—of the easterly line of the ranch, where the next ranch comes in. Ranches are scattered along there. There are some four or five ranches between the Springe and the Gopcevic Ranch, which is the old Floyd place. The Brown place is on the northerly side of the Lake, generally speaking. As you look from Lakeport, it is a little to the south. We refer to it ordinarily as the north portion of the lake. Lakeport is located on the westerly side and toward the northerly end. You would have to go around the northerly end of the lake to pass the Brown place; in other words, northeasterly from Lakeport, unless you crossed the bridge which I have already mentioned. If you go around the end of the lake, the Brown place is about 10 or 11 miles from Lakeport. The bridge is a wagon bridge of frame construction, built on pilings. It is not concrete. The last time I looked at it it was said to be in good condition. I have not been there for three or four years.

The inhabitants in the immediate vicinity of the mansion are principally engaged in farming or fruit-

(Testimony of E. P. Vandercook.)

raising. Its location might be stated as being in the vicinity of Mr. Hammond's place, and Edmonds, his brother-in-law. They are situated in the rear and north of this property. There are people of ostensibly some means and wealth in the immediate vicinity of the property. Their dwellings are very fair, frame structures. They did not, however, cost anything like \$45,000 or \$60,000. Mr. Hammond's place, however, must have cost about \$8,000. I base my opinion to the effect that the Brown place added \$60,000 in value to the land upon the following grounds: In the great amount of attention which it directed toward that property. The fact that it made that property very much more salable. We [116] had offers at the time of the construction of this house of some rather fabulous prices for land in the vicinity of the Brown place; we were not at that time in a position to sell anything because we still had other properties to acquire, but we have been offered as high as \$50 a front foot for some of the coves and shore reaches of the lake. The only way I can judge of the actual result is from the fact that there was at that time quiet an activity, quite a desire on the part of several people to acquire villa sites on the lake. If at that time we had been in a position to sell or take advantage of the prices offered for various lands in which the company was interested, we could have given a permanent value to the property around Clear Lake. We were offered as high as \$50 a front foot in the immediate vicinity, but we could not take advantage of such offers be-

(Testimony of E. P. Vandercook.)

cause we had quite a lot of property to acquire yet on the lake and we would simply be bidding against ourselves as a matter of business if we sold for \$50 a foot and bought it at \$2.50.

Mr. Brown, I might say, never had in excess of a one-fifth interest in the Central Counties Land Company. We had acquired at that time about 70 or 75 per cent, of the margin of the lake. We were engaged in negotiations for other pieces, various other parcels of land, and of course we assumed, and I think correctly so, that if we sold anything at these largely enhanced prices that it would operate against us in acquiring by purchase the rest of the property. We all believed it was proper. While it is true in a sense that it was a policy inimical to the company's interest to put these improvements on there, provided Brown could have foreseen that the value of the property would thereby be raised, nevertheless we were preparing to make a very large real estate operation of Clear Lake and we were trying to interest the rich class of people, the people who had the money to spend, in this development, and this seemed to us a very necessary [117] step; that is, we were very glad when Mr. Brown made up his mind to build the house. The improvement was Mr. Brown's own private enterprise.

The Central Counties Land Company built the bridge. Its object was to reach more readily properties on the easterly side of the lake, cutting off a detour around the Upper Lake district, I think, of 12 miles.

(Testimony of E. P. Vandercook.)

I don't think the building of this mansion on the property enhanced the value of this farm as a stock ranch. While it was used at that time principally for stock-raising, I do not say, however, that that was the only value it had. I consummated several of the deals which were undertaken at this time.

Mr. HENSHALL.—Isn't it a fact that the scheme then was to appropriate all the land in that vicinity, and that by lack of funds you were not able to make the purchase?

Mr. WHEELER.—Objected to as immaterial, irrelevant and incompetent, and not cross-examination.

The COURT.—It seems to me it is involved in the subject matter of this witness' examination, because he has laid before the jury his judgment as to the results flowing from this particular improvement, and the jury, among other tests, have a right, in determining what weight they will accord to his evidence, to know the general effect on his mind of what they had in contemplation in making up his estimate as to what these improvements added as value to that land. I think in that respect that the inquiry is a pertinent one.

Mr. WHEELER.—I will reserve an exception.

(Plaintiff's exception No. 1.)

A. We were certainly very much hampered for funds at certain times. We had quite a large asset in the way of clear property which we were able to borrow money on at times, and to carry payments [118] along on other lands. As late as 1910, nearly all of the optional contracts which we took upon the

(Testimony of E. P. Vandercook.)

lake, were either in existence or had been revived, and we owned in fee, roughly speaking, I do not like to give figures without consulting the books, but property to the value of about \$400,000.

The COURT.—In cost?

A. In cost. That is approximate; I would like to verify that statement by looking over the accounts. There is no question about it, it was pretty hard sledding; we did the best we could; we wanted to control the absolute situation around Clear Lake.

Mr. HENSHALL.—Q. Isn't it a fact that you intended to raise the water level many feet, and then have villas all around the lake?

A. We intended to conserve the water at a certain limit; ordinarily, that limit is supposed to be at 10 feet above the government low-water mark; that is a mark established by the government at the low-water stage. We assumed and argued that the holding of the water at the 10-foot level would increase the beauty and attractiveness of the lake, because it covered all the marshy spots; there were some 4,000 acres of swamp and overflowed land around Clear Lake, and if the water was held up, these spots would not become an eye-sore; when the water was out, they become offensive to the eye and were not attractive.

Q. If the water level were raised, how would that affect Mr. Springe's land, do you know?

A. Up to the 10-foot level it would not affect it harmfully in any way, in my judgment.

Q. Wouldn't it, as a matter of fact, Mr. Vander-

(Testimony of E. P. Vandercook.)

cook, flood about 300 acres of land, very valuable land?

A. I don't think it would flood anything that was not affected every winter.

Q. You do not? A. I do not.

Q. Do you know that to be a fact?

A. Well, that is my judgment; we have the surveys of the entire region; we can tell [119] exactly how that matter stands; we have contour maps of the lake.

Q. It is a fact, is it not, that this scheme that you have referred to was never consummated?

Mr. WHEELER.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—It is only admissible on the question of this witness' valuation. I do think it has a bearing upon that, as to whether or not an isolated improvement of the character which has been described could have added the value that the witness has stated to that particular property. I think in that regard that it is relevant and pertinent.

Mr. WHEELER.—I add to my objection that it is not cross-examination, and save an exception.

(Plaintiff's exception No. 2.)

The COURT.—The scheme has never been carried out?

A. No, not completely so; some portions of it are in process, that is, some of the allied interests are in process of consummation, but the real estate plan was abandoned after some years.

Mr. HENSHALL.—Q. Do you know whether that

(Testimony of E. P. Vandercook.)

bridge was ever dedicated to the public?

A. It was not while I had anything to do with it.

Q. And it has not been since, so far as you know?

A. Not so far as I know.

Q. By the way, was that house not built specifically for J. Dalzell Brown's personal use?

A. I think it was.

Q. Did you know the character of the improvements on that ranch at the time that building was put up?

A. Very plain, small house and barn, very inexpensive improvements at that time.

Q. Inexpensive? A. Inexpensive.

Redirect Examination.

In using the pronoun "we" as I have used it, I mean the Central Counties Land Company. In that company Brown had nearly a one-fifth interest. There were various other parties interested; [120] the Capay Ditch Company, of Woodland; Mr. George D. Gray; Mr. Archibald C. Kain, and a Mrs. Newton; Jose Costa; George M. Perine, and Anson Blake. George M. Perine became interested sometime in 1908; he was not one of the original men with us. All of these parties put up money in this corporation.

The Hammond place adjoined the property on the north line. Mr. Edmonds is Mr. Hammond's brother-in-law, whose ranch adjoins Hammond's ranch, a little further north. I do not know what their homes actually cost; I simply approximated it. Mr. Rodman had a place on the Upper Lake basin, right

(Testimony of E. P. Vandercook.)

at the end of the bridge on the Lakeport side. Mr. Rodman's bungalow, I would call it, was not very pretentious; a very neat place, and attractive. The Collier place is a villa site near there. Collier built a rather expensive house there a few years ago; it was a frame structure, but a very attractive house; probably cost \$15,000. The Floyd place is now known by the name of the Gopcevic place. It is attractive. The house, of course, is very old, built after the ideas of Captain Floyd. It resembles the deck of a ship—built in that style. I should imagine that the house probably cost in the neighborhood of \$20,000 when it was built. Various persons have homes on the lake who own boat landings and launches and yachts—good boats. The Brown place had a very good boat landing, constructed as a part of the improvement. There were various villa sites and homes about the lake in addition to the Brown place; approximately 6% of the lake was suitable for villa sites. Approximately 150 acres of the Brown place in the immediate vicinity of the Brown house were suitable for villa sites. There were clumps of foliage and trees at various places. I have never estimated the acreage carefully. I did have in mind the subdivision and sale of the property.

With reference to the enhanced value of the place, it [121] was not confined simply to the spot upon which the house was located and the surrounding grounds; indeed, the value applied to the entire property. It was our plan at that time to cut up a large part of the Springe ranch into small farms. When

(Testimony of E. P. Vandercook.)

I use "our plan," I mean the plan of the Central Counties Land Company. They do not own the ranch, but Mr. Brown, as you noted, gave us an option to take the property after he got in trouble. It was not our ranch when this building was put up there.

With reference to the purchase of the property, pending this action of ejectment, I made an offer to purchase this property from Mr. Springe. He gave me a price, through Mr. Wheeler, as my attorney, upon the property. The document which you have shown me dated March 4, 1908, states the price which Mr. Springe named.

Plaintiff then offered in evidence letter dated March 4th, 1908. Counsel for defendant admitted that the signature of Galpin, Elkins & Frost, as the agent of the defendant, was subscribed to this letter. This letter admitted in evidence and marked Plaintiff's Exhibit 16, and is in words and figures as follows:

**Plaintiff's Exhibit No. 16—Letter, March 4, 1908,
Galpin, Elkins & Frost to Wheeler.**

"(Letterhead of Galpin, Elkins & Frost, 110 Sutter
Street, San Francisco.)

"March 4, 1908.

Chas. S. Wheeler, Esq.,
Union Trust Bldg.,
San Francisco, Cal.

Dear Sir:

We are instructed by Mr. Heinz Springe to advise you that he is willing to sell to Central Counties

Land Company his certain real property situate in Lake County, Cal., which he contracted to sell to L. J. Shuman in that certain contract, in writing, between said Springe and said Shuman of date September 9, 1906, described as follows:

NE. $\frac{1}{4}$; SE. $\frac{1}{4}$; SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Section 21;

S. $\frac{1}{2}$ of Section 22;

SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Section 23;

NW. $\frac{1}{4}$; SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and fractional N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Section 26; [122]

Fractional N. $\frac{1}{2}$ of Section 27;

Fractional N. $\frac{1}{2}$ of Section 28;

Fractional E. $\frac{1}{2}$ of Section 29, lying east of slough;

All in Township 15 North, Range 9 West, Mount Diablo Base and Meridian.

Also that certain tract of land situate in the County of Lake, State of California, and being lots 3, 4, 9 and 12 of Section 6, Township 15 North, Range 8 West, M. D. M., containing about 178 acres of land.

It is to be understood that Mr. Springe reserves, and does not include in the property hereby offered for sale, the following described real property, to wit:

SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Lot 2, E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, and also a part of Lot 1, commencing at the northeast corner thereof, running thence west 10 chains, thence south to the meander line of Clear Lake, thence southeasterly along said meander line to the southeast corner of said Lot 1, and thence north to the place of beginning;

All situate in Lake County, Cal., in Section 26,

166 *Power & Irrigation Company of Clear Lake*
Township 15 North, Range 9 West, M. D. M.

The terms on which Mr. Springe will sell said property are as follows:

Proposition 1.

Sale price \$75,000.00 of which \$30,000.00 to be paid in cash within one week from date hereof;

The remaining sum of \$45,000.00 to be paid within 30 days hereafter;

Interest on deferred payment at $6\frac{1}{2}\%$ net per annum.

Proposition 2.

Terms of sale \$100,000.00, payable as follows:

\$25,000.00 cash to be paid within 90 days from date hereof;

The remaining sum of \$75,000.00 to be paid on or before 5 years from date hereof;

Possession to be given to Central Counties Land Company, as tenant only, upon signing of contract of sale and purchase, and of signing the lease of property;

A cash rental equivalent to $6\frac{1}{2}\%$ net on deferred payments to be charged from date of signing contract of sale until fully paid;

Rental to be stated in contract of sale as a sum definite per month, and to be so named in lease of premises;

Rental to be payable quarterly in advance.

In addition to the sale price herein named in the two propositions above, Central Counties Land Company must pay all labor and materialmen's liens now on the property offered for sale, or which may hereafter be placed on said property, for debts or obliga-

tions incurred by J. Dalzell Brown, or his representatives or agents. Central Counties Land Company also to pay all taxes now a lien on the property, also all taxes which may be levied on the property during the term of any contract or option to sell given by Mr. Springe; also to keep residence built by J. Dalzell [123] Brown, and boat house, insured for Springe's benefit to amount of \$25,000.00.

It is to be understood that time is to be of the essence of all terms and conditions expressed in contract of sale, and that in default of performance of any such conditions or terms Mr. Springe will be entitled to immediate possession of the property, and all rights of purchaser under contract will immediately cease and terminate.

It is to be understood, as a condition precedent to executing a contract of sale upon either of the terms hereinabove made, that the suit instituted by Central Counties Land Company against J. Dalzell Brown and Heinz Springe, in the City and County of San Francisco, shall be dismissed, and in the ejectment suit instituted by Heinz Springe against J. Dalzell Brown and others, at Lakeport, Cal., trial shall be had and a decree rendered in favor of the plaintiff, for the possession of the property.

We think this last necessary in order to eliminate Mr. Brown as a factor in the transaction.

Mr. Springe is willing to give such title to the above property offered for sale as he had at the time he tendered a deed to the property to J. Dalzell Brown in 1907, and which title, as we are advised,

(Testimony of E. P. Vandercook.)

was passed as good by Messrs. Gray & Cooper, attorneys for Brown.

In the event Central Counties Land Company is unable to accept Mr. Springe's first proposition, by reason of not having sufficient funds, but is willing to accept the terms expressed in his second proposition, Mr. Springe is willing to advance sufficient moneys to pay off the labor liens now on his property, or which may hereafter be filed and incurred by J. Dalzell Brown and others, on condition that he be repaid said moneys so advanced within a reasonable time, with interest.

The terms of sale herein made to Central Counties Land Company by Mr. Springe are open for acceptance by Central Counties Land Company until 12 o'clock M., Saturday, March 7th, 1908, by which time we shall hope to hear from you.

Yours truly,

(Sgd.) GALPIN, ELKINS & FROST."

I know approximately the location of the property secondly described in Plaintiff's Exhibit 16. I should say that it was of very little value; it is quite detached from the main ranch. The value of that property, in my opinion, on the 4th day of June, 1908, was about \$2.50 per acre.

The Springe ranch had nearly 4 miles frontage on the lake. There was no written agreement with Brown whereby the Central Counties Land Company or the California Industrial Company should have this property. Originally the Central Counties Land Company undertook to acquire the property and to put up the [124] preliminary deposit in

(Testimony of E. P. Vandercook.)

the hands of Mr. Shuman; following that our procedure was ordinarily to have the land conveyed to the California Industrial Company, this company in turn conveying everything except the overflowage right to the Central Counties Land Company, retaining in itself the overflowage right. About that time Mr. Brown became interested in the property and wanted to take it over, and agreed verbally that after he had determined upon the acreage which he desired to hold as the home place, he would turn the balance of the land back to the Central Counties Land Company at a price to be agreed upon between us.

Recross-examination.

Mr. HENSHALL.—Q. You have spoken, I think, of certain options that were given by Mr. Brown to the Central Counties Land Company. You know of these options, do you not? A. Yes.

Q. I ask you if the Central Counties Land Company ever went into possession of the property covered by those options?

Mr. WHEELER.—Objected to as immaterial, irrelevant and incompetent and not cross-examination.

The COURT.—What is the purpose of that?

Mr. HENSHALL.—I want to show, probably it will be admitted by counsel to be the fact, that this witness testified to the existence of these options, and they acted under the options, and that Brown put the Central Counties Land Company in the possession of this property, which was a portion of this

(Testimony of E. P. Vandercook.)

property to be sold to Brown; that was pending the litigation, and after the complaint was filed in the ejectment suit.

The COURT.—I will let the question be answered.

Mr. WHEELER.—Exception.

(Plaintiff's exception No. 4.)

A. I don't think I could answer that question accurately. My general recollection is that for a time we had a man by the [125] name of Simmons looking after the property for us, but to what period in the matter I could not place at the present moment.

The following colloquy then took place:

Mr. WHEELER.—It is alleged, if your Honor please, in paragraph 7 of the amended complaint, "That pursuant to the terms of said agreement, said Brown, on or about the 15th day of December, 1906, entered into possession of the premises mentioned in said agreement; that between said 15th day of December, 1906, and the 18th day of December, 1907, said Brown, with the knowledge and consent of said defendant, made and constructed valuable improvements upon said premises, and prior to the 18th day of December, 1907, had expended in making said improvements the sum of \$40,000."

"Defendant has no information or belief upon the subject sufficient to enable him to answer the allegations in plaintiff's amended complaint in that regard, and placing his denial upon that ground denies that prior to the 18th day of December, 1907,

or at any time or at all, one J. Dalzell Brown had expended in making improvements upon the premises referred to in Plaintiff's Amended Complaint on file herein, and described in Exhibit "A" to plaintiff's said complaint, the sum of \$40,000, or any sum in excess of \$30,000."

We accept the admission that \$30,000 was so expended, that representing the cash payment.

With regard to the expenditures for which mechanics' liens were filed, will it be admitted that they amounted to \$15,000?

Mr. ELKINS.—It was not that much.

Mr. WHEELER.—What is the total of the liens filed?

Mr. ELKINS.—We have corrected the amount, and the amount is \$9,358, and we paid in settlement of this \$7,540.

Mr. WHEELER.—The allegation in your answer of course was [126] that it was \$15,000. However you are satisfied with the figures, are you?

Mr. ELKINS.—Yes.

Mr. WHEELER.—You will admit, then, that the amount of the liens was actually how much?

Mr. ELKINS.—\$9,358. The amount paid by Mr. Springe in satisfaction of the liens was \$7,540.

Mr. WHEELER.—But the liens were believed by you at the time you filed your answer to be \$15,000, as sworn to by Mr. Springe.

Mr. ELKINS.—I will state, Mr. Wheeler, that there were other claims, that is, suits were filed against Mr. Brown; they neglected to file their liens

in time; one was \$3,500 and there were one or two others.

Mr. WHEELER.—Were those amounts expended on the property?

Mr. ELKINS.—On the property, but no liens filed.

Mr. WHEELER.—Did they total the \$15,000?

Mr. ELKINS.—Yes, about.

Mr. WHEELER.—That will stand admitted, there were liens filed only for the amount you have indicated?

Mr. ELKINS.—Yes.

Mr. WHEELER.—You allege that there was a demand for surrender of possession—on what date do you claim it was made? I notice some conflict apparently in that.

Mr. HENSHALL.—Where is the allegation that you want admitted in that regard?

Mr. WHEELER.—It is alleged that you made demand upon the same date that you filed your ejectment suit, and yet I notice in the ejectment suit that there is a claim that the demand was made on the 30th of October, 1907, while your ejectment suit was not filed until the month of January, 1908.

Mr. ELKINS.—I have not my memoranda here, but it was not on [127] that date, it was not until January that the demand was made.

Mr. WHEELER.—On the day that the suit was brought, that is the allegation.

Mr. ELKINS.—I think it was the 13th or 14th of January; the suit was filed on the 15th of January, as I recall.

Mr. WHEELER.—That will stand admitted, that on the 14th or 15th of January, demand was made for the possession of the premises and the ejectment suit was filed at that time?

The COURT.—Who was in possession at that time?

Mr. WHEELER.—The Central Counties Land Company had taken possession under Brown. It will be admitted by me, if the gentlemen have no objection, that it was after a *lis pendens* filed in the ejectment suit.

Mr. ELKINS.—I do not understand that. The last deed was tendered to Mr. Brown at the county jail, No. 54-64 Eddy Street, on December 17, 1907, and he remained in possession up till January, and then demand was made by Mr. Springe, the plaintiff, of Mr. Simmons, in charge of the property, that Mr. Simmons refused to deliver possession; then demand was later made on Mr. Brown in San Francisco in January, he still refused to give up possession, and then suit was brought.

Mr. WHEELER.—Can you give us the date on which the demand was made on Simmons and Brown?

Mr. ELKINS.—I have not it right here.

Mr. WHEELER.—Have you it approximately?

Mr. ELKINS.—Approximately. After Mr. Springe arrived here from Europe sometime in January, he and Mr. Frost went to Lakeport and made demand on Mr. Simmons for possession; the demand was refused, and Springe returned to San Francisco, and on January 14, or 15, I on behalf

of Mr. Springe, went out to the county jail and demanded possession of Mr. Brown, and he refused possession.

Mr. WHEELER.—That will stand admitted. With that we rest, then. [128]

Thereupon the defendant, through his counsel, moved for a nonsuit upon the grounds following, to wit:

1st. Upon the ground that there was no allegation in the complaint and no proof offered at the trial that the plaintiff had ever offered to restore, or had ever restored, any portion of the personalty or the proceeds thereof constituting a part of the consideration received by the assignor of the plaintiff pursuant to said sales contract entered into between one Shuman and the defendant, under the terms of which the plaintiff now seeks to recover.

2nd. Upon the ground that there was no proof upon the trial that the plaintiff, or his assignor, ever returned, or offered to return, to the defendant the real property of the defendant described in the said sales contract from the defendant to said Shuman—except that the assignor of the plaintiff surrendered the possession of said real property to the defendant subsequent to and pursuant to the judgment of the Court in the ejectment suit brought by the defendant Springe against J. Dalzell Brown, the assignor of the plaintiff, to recover possession of said real property.

3rd. Upon the ground that it appears from the proof adduced upon this trial that J. Dalzell Brown, the assignor of plaintiff, pursuant to said sales con-

tract, after full notice and knowledge of any defects in plaintiff's title to the lands described in said contract, elected to purchase said lands pursuant to said contract, and did specifically waive any and all possible defects in the title to the lands described in said contract.

4th. Upon the ground that it appears from the proof adduced upon this trial that the said J. Dalzell Brown, the assignor of the plaintiff, did not at any time rescind or offer to rescind such sales contract pursuant to the terms of which the plaintiff seeks to recover herein. But, on the contrary, it appears from such proof that J. Dalzell Brown, the assignor of the plaintiff, at all times [129] elected to purchase the lands of the defendants, notwithstanding any possible defects in the title thereto, at the price and upon the terms set forth in said sales contract, and that said J. Dalzell Brown failed to make such purchase for the sole reason that he was unable to obtain moneys with which to make such purchase.

5th. Upon the ground that the right to rescind said sales contract and to recover back from the defendant any of the moneys paid thereunder was waived by the allegations and admissions contained in the answer of J. Dalzell Brown, the assignor of the plaintiff in the said action in ejectment brought by the defendant, Heinz Springe, against said Brown, et al., to recover possession of the real property described in said sales contract; and by the conduct of the said J. Dalzell Brown, the assignor of the plaintiff, in making a defense to the said eject-

ment suit brought by the defendant herein to recover possession of said lands.

6th. Upon the ground that it appears from the proof adduced upon the trial in this action that upon demand made by the defendant herein upon the said J. Dalzell Brown, assignor of the plaintiff, for the delivery to the defendant herein, of the real property described in said sales contract, the said Brown failed and refused to surrender said lands; but, on the contrary, at all times, to and including the entry of judgment in said ejectment suit by the said Heinz Springe against the said J. Dalzell Brown, the said Brown retained possession of said lands to himself and his assignees and asserted his right of possession of said lands and to purchase the same pursuant to said sales contract, and that the said J. Dalzell Brown thereby waived all rights whatsoever he at any time might have had to rescind said contract to purchase said lands.

7th. Upon the ground that it affirmatively appears from the proof adduced upon the trial herein that there was at no time any mutual rescission of the said sales contract; but, on the contrary, defendant Springe herein has at all times stood upon his said contract, [130] asserted his rights thereunder, and has at no time offered to rescind, or did rescind said sales contract.

8th. Upon the ground that the judgment and decree of the Superior Court of the State of California in and for the County of Lake in said ejectment suit entitled, Heinz Springe vs. J. Dalzell Brown, et al., same being Lake County Superior

Court action No. 1789, which judgment was in favor of the defendant, Springe, herein and against the said J. Dalzell Brown, assignor of the plaintiff, was and is *res adjudicata* upon all the questions involved in this action, and that by reason of such judgment the plaintiff herein is estopped from asserting in this action that there was any rescission of said sales contract, or that the defendant herein did not have a good, merchantable title to the real property described in said contract, or that the defendant herein was at any time in default in the performance of any terms or conditions of said sales contract; and also estopped from asserting that the plaintiff herein or his said assignor, J. Dalzell Brown, did not commit a breach of said contract of purchase, or was not in default in making payments due pursuant to said contract, or by reason of such default did not forfeit all rights in and to said sales contract and in and to all moneys paid or expended in pursuance thereof.

9th. Upon the ground that it appears from the proof adduced upon the trial herein that J. Dalzell Brown, the assignor of the plaintiff, remained in possession of the lands described in said sales contract after he knew of the defective title thereto, and after demand had been made upon him to surrender said lands to the defendants herein, and that thereby said J. Dalzell Brown waived any and all objections to any defects in the title to said property, and waived any defects in the title contracted to be conveyed to him.

10th. Upon the ground that the allegations of the Complaint were not established by the evidence in-

troduced upon the trial herein, and that a variance exists between the said allegations and the proof on the trial. [131]

After arguments of counsel on defendant's motion for nonsuit, the following proceedings were had:

The COURT.—(Orally.) I have not had a very full opportunity to review what you have handed me just now, Mr. Wheeler. I see that it is in accord with what you have just been suggesting.

Mr. WHEELER.—Yes, your Honor.

The COURT.—I have listened to the arguments with a great deal of attention, because they have been illuminating; but as a result I am unable to withdraw my mind from the attitude which has been perhaps sufficiently indicated through the argument, that the judgment in this action in ejectment, by reason of the issues that were raised by the parties, is a conclusive adjudication upon the plaintiff here.

Let us see. The rule is aptly stated by Mr. Freeman in his very excellent work on judgments as to what is concluded by such an adjudication, "An adjudication," says Mr. Freeman, "is final and conclusive not only as to the matters actually determined, but as to every other matter which the parties might have litigated, and have decided as incidental to or connected with the subject matter of litigation, and every matter coming within the legitimate purview of the original action both in respect to matters of claim and of defense. * * *

"The defendant must bring forward all the defenses which he had to the cause of action asserted

in the plaintiff's pleadings at the time the action was commenced."

And again: "To render a matter *res judicata*, it is not essential that it should have been distinctly and specifically put in issue by the pleadings."

Now, in this case, we have this situation. Here was this contract of sale and purchase. Under its terms the purchaser was put in possession. He made the first payments, and it came down to the point of final payment. He failed to pay under circumstances which, in the judgment of the plaintiff to the action constituted a breach, whereupon by a course thoroughly well [132] established as to the rights of the parties under such circumstances, he brought his action in ejectment to oust the purchaser. While that action, independently considered, did not essentially involve the contract, in this instance it was based upon the contract because, necessarily, the plaintiff in the action could not recover unless he established a breach by the defendant under that contract.

It may be conceded, as has been suggested, that, had Mr. Brown seen fit to refuse to appear, or had simply put in a negative defense and let judgment go,—I am willing to concede that the judgment would have concluded nothing except the question as to the right of possession. But he did not do that. He saw fit not only to interpose his negative response to the title of the plaintiff, but he set forth his supposed rights under this contract whereby he sought to establish the fact that he was holding within its terms. When he did that, he submitted

the entire controversy, not only as based upon what was in those pleadings, but whatever he might have stated in the way of defensive matter to show that he was not in default under that contract. We took the ground in his defense to that action that the plaintiff was not entitled to recover because, notwithstanding the last payment had not been made in accordance with the terms of the contract,—which he admitted to be then due and payable—that the plaintiff had failed to tender to him a deed which would carry a merchantable title. He stood upon that defense, and it was adjudged against him. Now, mind you, if he had a good defense in connection therewith which would have shown to the court that in fact, by reason of the subsequent agreement between the parties, time as the essence of the contract had been waived as to the payment which remained to be made, and that no subsequent notice had been given him, and that, therefore, he was not in default in that last payment, unquestionably the judgment must of necessity, had the fact so found, gone in [133] his favor, because that would have shown that the action in ejectment was premature; that the plaintiff in fact had no cause of action, because of the existence of this contract, and which, supplemented by the subsequent arrangement between the parties, would have shown that the last payment was not in fact due, and that, therefore, as the matter then stood, Mr. Brown was rightly in possession until such time as he was put by proper notice to the necessity of meeting the last payment; and that, of course, would have rested

upon the tender to him of a proper deed conveying title. He did not do that. He rested upon the defense that I have indicated. Now, under the rule that I have stated as to what is included in a judgment under such issues it seems to me that that was his own fault. If he had such a defense as is now claimed, he should have pleaded it in his answer, in accordance with the facts; and if sustained, he would undoubtedly have prevailed. He failed to do that. He set up a state of facts at variance indeed with what his assignee now claims to have been the real facts of the transaction. But the whole controversy was submitted to the court under those pleadings. The fact that there was the defect in Brown's defense as the evidence now would tend to disclose, could make no difference. The question that was in issue in that case,—and carrying with it everything essential to a judgment upon the issues,—was the question of possession. And when the court determined under the issues that were there presented that the defendant was in default under this contract, and that, therefore, the plaintiff was entitled to possession, it necessarily included a finding of everything which the defendant might have set up in that connection which would have tended to a different conclusion. That is the case as it presents itself to my mind, and I am unable to see my way clear to avoid the conclusion that results from it.

[134]

I am exceedingly loath always to take a case from the jury up what, in common parlance, might be termed a technical objection rather than upon the

merits, but the law contemplates that the plaintiff must make out a case which entitles him to go to the jury before the issues can be submitted to them.

Mr. WHEELER.—I do not wish to interrupt your Honor, but there is one matter which I think I should suggest. It seems to me that this proposition has escaped the attention of the court,—that what the court says might well be correct provided facts sufficient to constitute a defense had been pleaded, but there were not facts stated.

The COURT.—What I am saying necessarily includes that consideration. I have covered it by saying that it was involved in what he did plead, because, having rested his defense upon the contract, he was bound to bring forward everything in the nature of a defense which he had thereunder.

Mr. WHEELER.—My suggestion is that pleading no defense is like filing no answer at all, and is equivalent to a default.

The COURT.—I understand your position perfectly, but it does not accord with my judgment as to what was pleaded there and concluded by the judgment, because, as I have suggested, and as stated by Mr. Freeman, it concludes the parties not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to or connected with the subject matter of litigation. The defendant must bring forward all the defenses which he has to the cause of action.

Mr. WHEELER.—I understand that, but I insist that is not the rule that is applicable—

The COURT.—Yes. Now, as I say, I hesitate to take a case from the jury, but it is my duty, if a case is not made. It is a question of law whether a *prima facie* case is made, and it is [135] as much my duty to do that as it would be to submit the case to the jury if that situation did not present itself. But, however, estoppel by judgment is not a harsh rule. The doctrine of estoppel by judgment is one of the most beneficent rules that has grown out of our system of jurisprudence. Why? Because it makes for peace and quiet, and the termination of litigation. Therefore, when it can be seen that the party has had his day in court in order to present that which would constitute a right, and has permitted it to go against him because of his failure to properly set it up, he cannot thereafter complain; he cannot have, as was suggested this morning, “two bites at the cherry.”

Now, in the view I take of it that is precisely what is presented here under this state of facts, and accordingly the motion for nonsuit will be granted.

Mr. WHEELER.—Will you allow us the benefit of an exception?

The COURT.—Yes.

(Plaintiff's exception No. 5.)

That thereafter, on the 22d day of June, 1916, the Court caused to be made and entered in the above-entitled cause the following minute order:

“The parties and the jury being present as heretofore, the trial was resumed by the further arguments of counsel, at the conclusion of which the motion was submitted and being fully considered it was ordered that said motion be and

the same is hereby granted, to which ruling the plaintiff then and there duly excepted. Ordered that judgment be entered accordingly, with costs to the defendant, and that the jury be discharged."

That thereafter on the 22d day of June, 1916, the following judgment in the above-entitled cause was made and entered:

"JUDGMENT ON NONSUIT. This cause having come on regularly for trial on the 20th day of June, 1916, being a day in the March 1916 term of said Court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; Charles S. Wheeler, Esq., appearing as attorney for the plaintiff and R. P. Henshall and Luther Elkins, Esqrs., appearing as attorneys for the defendant, and the trial having been proceeded with on the 21st and 22d days of June in said year and [136] term and evidence having been introduced on behalf of plaintiff and the attorneys for the defendant having, at the close of plaintiff's case, moved the Court for a judgment of nonsuit, and the Court, after hearing arguments and fully considering said motion, having ordered that said motion be granted and that a judgment of nonsuit be entered herein with costs to the defendant;

Now therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that plaintiff take nothing by this action; that judgment of nonsuit be and

the same is hereby entered against said plaintiff herein, that defendant go hereof without day; and that said defendant do have and recover of and from said plaintiff his costs in this behalf expended taxed at \$—.

Judgment entered June 22, 1916.

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

That thereafter, by order of Court made and entered on the 30th day of June, 1916, said cause was continued over the term for the purposes of the settlement of plaintiff's bill of exceptions.

That thereafter, by order of Court made on the 30th day of June, 1916, an extension of time to and including July 12, 1916, was granted to plaintiff within which to prepare and serve his proposed bill of exceptions.

That thereafter, by order of Court based on the stipulation of counsel made on the 10th day of July, 1916, plaintiff was granted an extension of ten days from and after July 12th, within which to prepare and serve his proposed bill of exceptions.

That thereafter, on the 19th day of July, 1916, by order of Court based on the stipulation of counsel, plaintiff was granted an extension of ten days from and after July 22d within which to prepare and serve his proposed bill of exceptions to be used in the prosecution of a writ of error from the judgment herein.

WHEREFORE said Power and Irrigation Company of Clear Lake, a corporation, plaintiff herein, presents this its said bill of exceptions and requests that the same be settled and allowed.

CHARLES S. WHEELER, and
JOHN F. BOWIE,

Attorneys for Plaintiff. [137]

**Stipulation Re Settlement, etc., of Bill of
Exceptions.**

It is hereby stipulated that the foregoing bill of exceptions may be settled, allowed and certified by the Court as full, true and correct, and that the copies of papers introduced in evidence by plaintiff, which are attached as exhibits to defendant's answer herein, need not be set out in full, but may be incorporated herein by reference.

LUTHER ELKINS,
R. P. HENSHALL,
Attorneys for Defendant.

Order Settling, etc., Bill of Exceptions.

I hereby certify that the foregoing bill of exceptions to be used on plaintiff's writ of error from the judgment herein is full, true and correct, and contains in substance all the evidence offered or received at the trial of the above-entitled action, together with all admissions of counsel, and that it was presented within the time required by law, and the same is hereby settled and allowed this 19th day of January, 1917.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed January 19, 1917. Walter B. Maling, Clerk. [138]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No. 15,796.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,
Plaintiff,

vs.

HEINZ SPRINGE,
Defendant.

Petition for Writ of Error.

To the Honorable Court Above Named:

Now comes Power and Irrigation Company of Clear Lake, a corporation, plaintiff in the above-entitled action, by Charles S. Wheeler, and John F. Bowie, its attorneys, and respectfully shows that on June 22, 1916 the court caused to be made and entered herein its Minute Order, wherein and whereby the said Court granted defendant's motion for a nonsuit in the above-entitled action and ordered that Judgment be entered accordingly with costs to the defendant; and upon said order so made as afore-said a final judgment of nonsuit was entered on the 22d day of June, 1916, against your petitioner, Power & Irrigation Company of Clear Lake, a corporation, plaintiff above named.

Your petitioner feels itself aggrieved by said or-

der and judgment entered thereon as aforesaid and herewith petitions the court for an order allowing it to procure a Writ of Error to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting at San Francisco, under the laws of the United States in such cases made and provided.
[139]

WHEREFORE, the premises considered, your petitioner prays that a writ of error do issue, that an appeal in its behalf to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, in said Circuit, for the correction of errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by the plaintiff in error, conditioned as the law directs.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Plaintiff in Error.

Writ of error granted upon the foregoing petition upon the petitioner filing a bond in the sum of five hundred dollars (\$500) to be conditioned as required by law.

Dated, August 16th, A. D. 1916.

WM. C. VAN FLEET,
Judge.

Due service and receipt of a copy of the within petition and order this 16th day of August 1916, is hereby admitted.

LUTHER ELKINS,
R. P. HENSHALL,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 16, 1916. Walter B. Maling, Clerk. [140]

In the District Court of the United States, for the Northern District of California, Second Division.

No. 15,796.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,
Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Assignment of Errors on Writ of Error.

Now comes the plaintiff in the above-entitled action by its attorneys, Charles S. Wheeler and John F. Bowie, and avers that the judgment entered in the above-entitled cause on the 22d day of June, 1916, is erroneous and unjust to the plaintiff, and files with its petition for a writ of error the following assignment of errors, and specifies that the judgment is erroneous in each and every of the following particulars, viz.:

I.

The Court erred in granting defendant's motion for a nonsuit, forasmuch as it appears that plaintiff made out a complete case upon the first count of said complaint.

II.

The Court erred in granting defendant's motion for a nonsuit, forasmuch as it appears that plaintiff

made out a complete case upon the second count of said complaint.

III.

The Court erred in granting defendant's motion for a nonsuit, forasmuch as it appears that plaintiff made out a complete case upon the third count of said complaint. [141]

IV.

The Court erred in granting defendant's motion for a nonsuit, forasmuch as it appears that the Court held that a certain judgment of ejectment rendered by the Superior Court in and for the county of Lake, State of California, in an action wherein defendant Heinz Springe was plaintiff and J. Dalzell Brown et al. were defendants operated as an estoppel and estopped the plaintiff in the case at bar from suing upon its claim.

The judgment of the Court in granting a nonsuit upon the said ground was erroneous, forasmuch as:

1. The said judgment was not an estoppel, in that it appears that the claim of plaintiff advanced in this action was not adjudicated in the said former action.

2. It appears on the face of the said proceedings in the said ejectment suit that the said Brown had entered into possession under a contract of purchase and sale; that the said Brown while in such possession and while admitting that the time for the final payment under said contract of purchase and sale had arrived was nevertheless neglecting and refusing to pay the same, basing his refusal upon the claim that said Springe's title was defective.

3. That upon the foregoing state of facts, plaintiff in said action in ejectment was entitled to a judgment restoring possession, regardless of any question of title in the said plaintiff, and the matters set up by the said Brown constituted no defense to the said action, and nothing was adjudicated in the said action other than that plaintiff was entitled to recover the possession of the said premises, and there was no adjudication upon the right of the said Brown to recover back amounts paid by him under said contract or the value of the improvements made by him upon the lands into the possession [142] of which he had entered under said contract.

Wherefore, plaintiff, prays that the said judgment be reversed, and that the District Court be directed to deny said motion for nonsuit, or that such other relief be awarded as the nature of the case may demand.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Plaintiff.

Due service and receipt of a copy of the within assignment of errors this 16th day of August, 1916, is hereby admitted.

LUTHER ELKINS,
R. P. HENSHALL,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 16, 1917. Walter B. Maling, Clerk. [143]

*In the District Court of the United States, for the
Northern District of California, Second
Division.*

No. 15,796.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE (a Corporation),

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
that we, Power and Irrigation Company of Clear
Lake, a corporation, as principal, and Hartford Acci-
dent and Indemnity Company, a corporation organ-
ized and existing under the laws of the State of Con-
necticut and authorized to transact surety business
in the State of California, as surety, are held firmly
bound unto Heinz Springe in the sum of Five Hun-
dred and no/100 (\$500.00) Dollars, lawful money of
the United States, to be paid to him and to his execu-
tors, administrators and assigns, to which payment
well and truly to be made we bind ourselves, and each
of us, jointly and severally, and each of our succes-
sors and assigns, by these presents.

Sealed with our seals and dated this 17th day of
August, 1916.

WHEREAS, the above-named Power and Irriga-
tion Company of Clear Lake has prosecuted a writ of
error to the Circuit Court of Appeals of the United

States to reverse the judgment of the District Court of the United States for the Northern District of California in the above-entitled cause;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Power and Irrigation Company of Clear Lake shall prosecute its said writ of error to effect and [144] answer all costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

Dated, August 17th, A. D. 1916.

[Seal Power & Irrigation Co.]

POWER AND IRRIGATION COMPANY
OF CLEAR LAKE,

By H. S. ELLIOT, President,

By R. H. BORLAND, Secretary.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

By JAMES W. MOYLES.

[Seal Hartford Accident & Indemnity Co.]

Approved August 17th, 1916.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Aug. 17, 1916. Walter B. Maling, Clerk. [145]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No. 15,796.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE (a Corporation),
Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Prayer for Reversal.

To the Honorable, the Circuit Court of Appeals of
the United States for the Ninth Circuit:

Comes now Power and Irrigation Company of
Clear Lake, a corporation, plaintiff in error, and
prays the court to reverse the judgment of the Dis-
trict Court of the United States for the Northern
District of California, Second Division, made and
entered in the above-entitled cause on the 22d day of
June, 1916, and for such other and further relief as
may be required from the nature of the cause.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed Aug. 17, 1916. Walter B.
Maling, Clerk. [146]

*In the Southern Division of the United States
District Court, in and for the Northern District
of California, Second Division.*

No. 15,796.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Praeceptum for Transcript on Writ of Error.

To the Clerk of the Above-entitled Court:

Please make up, print, and issue in the above-entitled cause a certified transcript of the record upon a writ of error allowed in this cause to the Circuit Court of Appeals of the United States for the Ninth Circuit, sitting at San Francisco, California, the said transcript to include the following:

Amended Complaint;

Answer;

Minute Order Granting Nonsuit;

Judgment of Nonsuit;

Bill of Exceptions;

Petition for Writ of Error, and Order endorsed thereon allowing same;

Assignment of Errors;

Writ of Error;

Citation on Writ of Error;

Bond on Appeal;

Praeceptum for Transcript on Writ of Error.

You will please transmit to the Circuit Court of Appeals [147] for the Ninth Circuit, sitting at San Francisco, the said record when prepared, together with the original Citation herein.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 1, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [148]

*In the Southern Division of the United District
Court, in and for the Northern District of Cali-
fornia, Second Division.*

No. 15,796.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,
Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing one hundred forty-eight (148) pages, numbered from 1 to 148, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remains of record and on file in the office of the clerk of

said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$100.00; that said amount was paid by the attorneys for the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of March, A. D. 1917.

[Seal] WALTER B. MALING,
Clerk United States District Court, in and for the
Northern District of California. [149]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No. 15,796.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,
Plaintiff,
vs.
HEINZ SPRINGE,
Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable
Judge of the District Court of the United States
for the Northern District of California, Second
Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in

the said District Court, before you, between Power and Irrigation Company of Clear Lake, a corporation, plaintiff in error, and Heinz Springe, defendant, in error, a manifest error has happened to the damage of said Power and Irrigation Company of Clear Lake, a corporation, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the party aforesaid, in this behalf do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you have the same at the City and County of San Francisco, State of California, where said court is sitting, within thirty days from the date hereof in the said Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit [150] Court of Appeals may cause further to be done therein to correct the errors, what of right, and according to the law and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 17th day of August, 1916.

[Seal]

WALTER B. MALING,
Clerk of the District Court of the United States, for
the Northern District of California.

By _____
Deputy Clerk.

Allowed this 17th day of August, A. D. 1916.

WM. C. VAN FLEET,

Judge. [151]

[Endorsed]: No. 15,796. In the United States District Court for the Northern District of California. Power and Irrigation Company of Clear Lake, a Corporation, Plaintiff, vs. Heinz Springe, Defendant. Writ of Error. Filed Aug. 17, 1916. Walter B. Maling, Clerk.

Due service and receipt of a copy of the within writ of error this 17th day of August, 1916, is hereby admitted.

LUTHER ELKINS,

R. P. HENSHALL,

Attorneys for Defendant. [151½]

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk. [152]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

No. 15,796.

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States to HEINZ
SPRINGE, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth District, to be holden at the City and County of San Francisco, in the State of California, on the 15th day of September, A. D. 1916, being within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Northern District of California, wherein Power and Irrigation Company of Clear Lake, a corporation, is the plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable WILLIAM C. VAN FLEET, United States District Judge for the North-

ern District of California, this 17th day of August, 1916.

WM. C. VAN FLEET,
Judge. [153]

[Endorsed]: No. 15,796. In the United States District Court for the Northern District of California (Second Division). Power and Irrigation Company of Clear Lake, a Corporation, Plaintiff, vs. Heinz Springe, Defendant. Citation on Writ of Error. Filed Aug. 17, 1916. Walter B. Maling, Clerk.

Due service and receipt of a copy of the within Citation this 17th day of August, 1916, is hereby admitted.

LUTHER ELKINS,
R. P. HENSHALL,
Attorneys for Defendant.

[Endorsed]: No. 2956. United States Circuit Court of Appeals for the Ninth Circuit. Power and Irrigation Company of Clear Lake, a Corporation, Plaintiff in Error, vs. Heinz Springe, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed March 20, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

No. —

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,

Plaintiff,

vs.

HEINZ SPRINGE,

Defendant and Appellant.

**Stipulation and Order Extending Time to and
Including October 15, 1916, to File Record, etc.**

It is hereby stipulated that the time heretofore allowed said appellant to docket said cause and file the record thereof with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit be enlarged and extended to and including the 15th day of October, 1916.

Dated at San Francisco, California, September 12, 1916.

LUTHER ELKINS,

R. P. HENSHALL,

Attorneys for Defendant.

It is so ordered.

WM. C. VAN FLEET,

Judge.

[Endorsed]: No. —. In the United States Circuit Court of Appeals for the Ninth Circuit. Power and Irrigation Company of Clear Lake (a Corporation), Plaintiff, vs. Heinz Springe, Defendant. Stipulation Extending Time to Docket Cause and

File Record. Filed Sept. 13, 1916. F. D. Monekton,
Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial District.*

No. —

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,
Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

**Stipulation and Order Extending Time to and
Including November 15, 1916, to File Record,
etc.**

IT IS HEREBY STIPULATED AND
AGREED that the time within which plaintiff in
error shall docket the above-entitled cause and file
the record thereof with the clerk of the United States
Circuit Court of Appeals for the Ninth Circuit, be
enlarged and extended to and including the 15th day
of November, 1915.

Dated October 11th, 1916.

LUTHER ELKINS,
R. P. HENSHALL,
Attorneys for Defendant in Error.

So ordered by the Court.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. —. In the United States Cir-
cuit Court of Appeals, for the Ninth Circuit. Power
and Irrigation Company of Clear Lake (a Corpora-

204 *Power & Irrigation Company of Clear Lake*
tion), Plaintiff, vs. Heinz Springe, Defendant.
Stipulation Extending Time to Docket Cause and
File Record. Filed Oct. 11, 1916. F. D. Monekton,
Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

No. —

POWER AND IRRIGATION COMPANY, OF
CLEAR LAKE, a Corporation,
Plaintiff in Error,

vs.

HEINZ SPRINGE,
Defendant in Error.

**Stipulation and Order Extending Time to and
Including December 15, 1916, to File Record,
etc.**

It is hereby stipulated and agreed that the time
within which plaintiff in error shall docket the above-
entitled cause and file the record thereof with the
clerk of the United States Circuit Court of Appeals
for the Ninth Circuit, be enlarged and extended to
and including the 15th day of December, 1916.

Dated November 11th, 1916.

LUTHER ELKINS,
R. P. HENSHALL,
Attorneys for Defendant in Error.

So ordered by the Court.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. —. In the United States Cir-
cuit Court of Appeals, for the Ninth Circuit. Power

and Irrigation Company of Clear Lake, a Corporation, Plaintiff, vs. Heinz Springe, Defendant. Stipulation Extending Time to Docket Cause and File Record. Filed Nov. 13, 1916. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

No. —

POWER AND IRRIGATION COMPANY OF
CLEAR LAKE, a Corporation,
Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error,

**Stipulation and Order Extending Time to and
Including January 2, 1917, to File Record, etc.**

It is hereby stipulated and agreed that the time within which plaintiff in error shall docket the above-entitled cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be enlarged and extended to and including the 2d day of January, 1917.

Dated, December 11, 1916.

LUTHER ELKINS,
R. P. HENSHALL,

Attorneys for Defendant in Error.

So ordered by the Court.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. —. In the United States Circuit Court of Appeals, for the Ninth Circuit. Power

206 *Power & Irrigation Company of Clear Lake*
and Irrigation Company of Clear Lake, a Corpora-
tion, Plaintiff, vs. Heinz Springe, Defendant.
Stipulation Extending Time to Docket Cause and
File Record. Filed Dec. 12, 1916. F. D. Monckton,
Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. —.

POWER & IRRIGATION COMPANY OF CLEAR
LAKE,

Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

**Affidavit of Charles S. Wheeler, and Order Extend-
ing Time to and Including February 1, 1917, to
File Record, etc.**

State of California,
City and County of San Francisco,—ss.

Charles S. Wheeler, being duly sworn, deposes
and says:

That he is one of the attorneys of record for the
plaintiff in the above-entitled action.

That said action was heretofore tried in the Dis-
trict Court of the United States for the Northern
District of California, Division 2 thereof, and judg-
ment was rendered for the defendant; that there-
after and within the time prescribed by law plain-
tiff perfected an appeal to the above-entitled court,
and that the time within which plaintiff shall, under

the rules, docket said cause and file his record on appeal expires this day, January 2d, 1917; that a bill of exceptions is in process of settlement, that the proposed bill and proposed amendments thereto were handed to the Clerk of the United States District Court under the provisions of the rules of said court, on December 26th, 1916; that no date has yet been fixed for the settlement of said bill of exceptions by the said court, and that the record on appeal in this case cannot be prepared until said bill of exceptions has been settled.

Affiant further states that at least thirty days will be required before said bill of exceptions can be settled and engrossed and record prepared so that the above-entitled cause can be docketed and the record filed.

CHARLES S. WHEELER.

Subscribed and sworn to before me this 2d day of January, A. D. 1917.

[Seal] ALICE SPENCER,
Notary Public in and for the City and County of
San Francisco, State of California.

Order Extending Time.

Good cause appearing from the foregoing affidavit, it is hereby ordered that the time within which plaintiff in error in the above-entitled matter shall docket his said cause and file the record thereof with the clerk of the above-entitled court, be and the same hereby is enlarged and extended thirty (30) days from and after the date hereof.

Dated January 2d, A. D. 1917.

WM. C. VAN FLEET,

Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Power & Irrigation Company of Clear Lake, Plaintiff in Error, vs. Heinz Springe, Defendant in Error. Affidavit for Extension of Time to Docket Cause and File Record, and Order Extending Time. Filed Jan. 2, 1917. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. ——.

POWER & IRRIGATION COMPANY OF CLEAR
LAKE,

Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

Affidavit of Charles S. Wheeler, and Order Extending Time to and Including March 20, 1917, to File Record, etc.

State of California,

City and County of San Francisco,—ss.

Charles S. Wheeler, being duly sworn, deposes and says:

That he is one of the attorneys of record for the plaintiff in the above-entitled action.

That said action was heretofore tried in the District Court of the United States for the Northern

District of California, Division 2 thereof, and judgment was rendered for the defendant; that thereafter and within the time prescribed by law, plaintiff perfected an appeal to the above-entitled court, and that the time within which plaintiff shall, under the rules, docket said cause and file his record on appeal expires February 1, 1917.

That the preparation and settlement of bill of exceptions in this matter consumed considerable time, and said bill of exceptions has finally been settled and the engrossed bill was certified by the Court and filed on January 19, 1917; that the record in this case will be of considerable length and will require some considerable time for preparation; and affiant believes and avers that the Clerk of the District Court should have until March 1st, 1917, within which to prepare said record and transmit same to the clerk of the above-entitled court.

Affiant is informed and believes that the calendar for the February term of this court has been prepared and that the above-entitled matter cannot now be placed on the calendar until the May term of this court, and that the hearing and final determination of this case will not in any way be postponed by the extension of time here requested.

CHARLES S. WHEELER,

Subscribed and sworn to before me this 23d day of January, 1917.

[Seal]

ALICE SPENCER,

Notary Public in and for the City and County of
San Francisco, State of California.

Order Extending Time.

Good cause appearing from the foregoing affidavit, it is hereby ordered that the time within which plaintiff in error in the above-entitled matter shall docket his said cause and file the record thereof with the clerk of the above-entitled court, be and the same hereby is enlarged and extended to and including March 1st, 1917.

Dated January 24, 1917.

WM. W. MORROW,
Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. Power & Irrigation Company of Clear Lake, Plaintiff in Error, vs. Heinz Springe, Defendant in Error. Affidavit for Extension of Time to Docket Cause and File Record. Filed Jan. 24, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. —.

POWER & IRRIGATION COMPANY OF CLEAR
LAKE,

Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

Affidavit of Charles S. Wheeler, and Order Extending Time to and Including March 1, 1917, to File Record, etc.

State of California,
City and County of San Francisco,—ss.

Charles S. Wheeler, being duly sworn, deposes and says:

That he is one of the attorneys of record for the plaintiff in the above-entitled action.

That said action was heretofore tried in the District Court of the United States for the Northern District of California, Second Division thereof, and judgment was rendered for the defendant; that thereafter and within the time prescribed by law, plaintiff perfected an appeal to the above-entitled court, and that the time within which plaintiff shall, under the rules, docket said cause and file his record on appeal expires to-day, March 1, 1917.

That a bill of exceptions has been settled and filed, and a praecipe for the preparation of said record by the clerk of the District Court has been filed, but affiant has been informed and believes that additional time will be required for the clerk to prepare said record.

Affiant is further informed and believes that the above appeal cannot be placed on the calendar for argument in the above-entitled court until the May term thereof, and that the hearing and final determination of said appeal will in no way be postponed by an extension of time to and including March 20, 1917, within which to allow the clerk of the lower

court to prepare said record, and to file same and docket said cause in this court.

CHARLES S. WHEELER.

Subscribed and sworn to before me this 1st day of March, 1917.

[Seal]

ALICE SPENCER,

Notary Public in and for the City and County of San Francisco, State of California.

Order Extending Time.

Good cause appearing from the foregoing affidavit, it is hereby ordered that the time within which plaintiff in error in the above-entitled matter shall docket his said cause and file the record thereof with the clerk of the above-entitled court, be and the same hereby is enlarged and extended to and including March 20, 1917.

Dated March 1st, 1917.

WM. W. MORROW,

Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. *Power & Irrigation Company of Clear Lake*, Plaintiff in Error, vs. *Heinz Springe*, Defendant in Error. Affidavit for Extension of Time to File Record. Order Extending Time. Filed Mar. 1, 1917. F. D. Monckton, Clerk.

No. 2956. United States Circuit Court of Appeals for the Ninth Circuit. *Power & Irrigation Company of Clear Lake* vs. *Springe*. Seven Orders Under Rule 16 Enlarging Time to Mch. 20, 1917, to File Record Thereof and to Docket Case. Refiled Mar. 20, 1917. F. D. Monckton, Clerk.

No. 2956.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

POWER AND IRRIGATION COMPANY OF CLEAR
LAKE, a Corporation,

Plaintiff in Error,

VS.

HEINZ SPRINGE,

Defendant in Error.

Brief of Plaintiff in Error.

CHARLES S. WHEELER and
JOHN F. BOWIE,

Attorneys for Plaintiff in Error.

The James H. Barry Co.
San Francisco

Filed

OCT 1 1911

F. D. Monahan

Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

POWER AND IRRIGATION COM- PANY OF CLEAR LAKE, a Corpo- ration, <i>Plaintiff in Error,</i>	} No. 2956
v.	
HEINZ SPRINGE, <i>Defendant in Error.</i>	

BRIEF OF PLAINTIFF IN ERROR.

Plaintiff in error sued upon an assigned claim to recover moneys paid to defendant under a contract for the purchase and sale of certain real and personal property, and also to recover the value of certain improvements placed by its assignor upon defendant Springe's lands.

The court below granted defendant a nonsuit upon the ground that plaintiff is estopped from pressing its claim because of a judgment in ejectment rendered in a suit to which defendant Springe and plaintiff's assignor were parties (Tr., pp. 178-183).

The real meaning of the said judgment of nonsuit

is that although plaintiff's assignor was once possessed of a lawful and just claim against defendant Springe for approximately \$20,000.00 actual cash paid to Springe and for \$30,000.00 actually paid out for improvements on Springe's land, these just and valid claims were irretrievably lost, nevertheless, because, as the trial court conceives it, the judgment in ejectment is a conclusive determination against their validity. The purchase price which Springe agreed to take for the land was \$47,000.00. The judgment of nonsuit leaves in Springe's hands not only the land but also more than \$50,000.00 in cash and improvements. Plaintiff does not accede to the view that the judgment in ejectment is a bar to these claims and has sued out this writ of error.

STATEMENT OF FACTS.

Briefly stated, the facts are as follows: On September 20, 1906, one Shuman entered into a contract with defendant Springe for the purchase and sale of certain real and personal property (Tr., pp. 10-17). The total purchase price for both the realty and the personalty was \$55,000.00, and of this sum \$8,000.00 was for the personal property, and the balance for the realty (Tr., p. 13). The purchase price of the personal property was paid in full, and that part of the contract relating to the personalty has no further bearing upon the case. Shuman assigned the contract to Brown. Brown entered into possession of the

land pursuant to the contract, and proceeded to erect valuable improvements on the same. All payments to Springe on account of the realty were duly made as called for by the contract, with the exception of the final payment. The payments so made aggregated \$18,500.00, and the interest paid to Springe brought up the total payments to approximately \$20,000.00 (Tr., pp. 11-13).

The contract contained the following provisions respecting the vendor's title:

"The seller agrees to furnish an abstract of title covering the lands hereby agreed to be sold complete to date on or before December 15th, 1906. The purchaser is allowed thirty days after receipt of said abstract within which to examine title. Objections to the title, if any, shall be reported to the seller, in writing, within said period of thirty days, and if not so reported shall be deemed to have been waived. The seller agrees to remove defects rendering the title unmerchantable and specified by the purchaser in his written report of objections; but if said defects (saving and excepting the securing of said patent) are not removed within a reasonable time, not to exceed ninety days after the receipt by the seller of said written report, the purchaser may at his option insist upon the specific performance of the seller's agreement to sell, extend the time for the removal of said defects, or declare this agreement at an end, in which latter event the seller agrees to return to him the sum of money herein receipted for and any further sums paid on account of said purchase price.

* * *

"The delivery to the purchaser of a good and sufficient deed of grant, bargain and sale covering title to said above described parcels of land and payment of said last installment of twenty-eight thousand five hundred (\$28,500) dollars of the purchase price are concurrent conditions" (Tr., pp. 12 and 13).

A written report, presenting some twenty objections to the title, was made on December 6, 1906 (Tr., p. 116).

Defendant not having cleared up the defects within ninety days, Brown, under date of March 18, 1907, insisted upon the specific performance of the contract and extended Springe's time to remedy the defects until September 1, 1907 (Tr., p. 126).

Defendant Springe thereupon under date of April 16, 1907, agreed to clear up these objections (Ex. 5, Tr., p. 128).

The final payment fell due by the terms of the contract, on September 15, 1907. In June, July, August and September, 1907, Springe was still engaged in clearing up the vendee's objections (Tr., pp. 130-131-140, incl.). On September 3, 1907, two days later than the agreed extension, Brown through his counsel reiterated the necessity for remedying certain of the defects pointed out in the report of December 6, 1906, and added:

"Until this is done, we do not believe that there is sufficient record evidence of Mr. Springe's title" (Plaintiff's Ex. 11, Tr. 139-140).

While matters were in this condition, and three days before the date fixed by the contract for the final payment, Brown, on September 12, 1907, at the request of Springe, waived in writing the production and tender of a deed by Springe, which tender

Springe, by the terms of the contract, was obligated to make on September 15, 1907 (Tr., pp. 141-13).

This waiver by Brown was accepted by Springe upon the express understanding that Springe would with all diligence cause to be delivered to Brown upon payment of the balance of the purchase price a "due and proper deed conveying the property" to Brown (Tr., pp. 141-142).

The phraseology of this waiver, like the contract itself, called not simply for a deed, but for a merchantable record title, and was not a waiver of objections to Springe's title.

Haynes v. White, 55 Cal., 38, 40;

Easton v. Montgomery, 90 Cal., 307, 314;

Winkler v. Jerrue, 20 Cal. App., 555, 559;

Agnew v. Nelson, 27 Cal. App., 39, 41, 42.

The waiver and agreement of September 12, 1907, set at large the time for the final payment under the contract. Time, in other words, was no longer of the essence of the contract.

Nothing further in the way of clearing the title was done by Springe. He gave Brown no notice that time would again be made of the essence of the contract or that he would tender a deed on a day certain and demand payment on that day. He simply offered Brown a deed without clearing the title, and without any previous notice or demand upon Brown, and then demanded possession and brought ejectment and re-

covered a judgment giving him the possession of the property (Tr., p. 150 and 97-99).

Springe has his land. He also has approximately \$20,000.00 in principal and interest which Brown paid to him and he has also the benefit of the improvements which were placed on his land by Brown at a cash outlay of \$30,000.00.

Plaintiff has succeeded by assignment to Brown's claim for the recovery of the moneys thus paid to Springe, and paid out for the improvements of said land, and has brought this suit.

I.

THE RIGHTS OF THE PARTIES AS ESTABLISHED BY THE FOREGOING FACTS, CONSIDERED APART FROM THE QUESTION OF RES ADJUDICATA.

By the agreement and waiver of September 12, 1907 (Tr., pp. 141-143), the legal rights of the parties from and after September 15 were as follows:

Springe's Rights and Duties:

Springe, if he wished to stand upon the contract and obtain a forfeiture of Brown's previous payments and outlays ~~and~~ if Brown should fail to make the final payment, was bound to do three things, viz:

(1) He was bound first to perfect his title so that he could comply with his contract; for the tender of a merchantable record title was a condition to be performed concurrently with the final payment;

(2) After perfecting his title he was bound to give to Brown reasonable and explicit notice of his intention to tender a deed on a designated day, and that he would claim a forfeiture if payment was not made at that time (see cases quoted *infra*); and

(3) He was bound to make a tender of a deed in accordance with such notice.

In this way—and only in this way—could Springe, if Brown failed to pay, become lawfully entitled to retain the money ^{to}therefore paid to him by Brown, together with the benefit of Brown's expenditures.

The foregoing propositions of law are perfectly well settled as we shall now see:

The provisions of the contract which called for the delivery of a deed conveying a good title and for the final payment were concurrent conditions (Tr., pp. 13-14).

Such being the case it is of course clear that Springe could not put Brown in default unless able to furnish a good title (Civil Code of California, §1439).

But as already said it would not have been enough if Springe had merely cleared his title and tendered a deed. He was bound to go further and give due and proper notice to Brown of his intention to tender the deed and demand the final payment upon a day certain, and he should also have notified Brown that if payment were not made at the designated time a forfeiture would be exacted.

These phases of the law are illustrated by the following quotations from *Boone v. Templeman*, 158 Cal., 290. (All italics ours.)

"The general rule on the subject is thus stated by Mr. Pomeroy: 'A condition that the title shall be made, or the price shall be paid, on or before a day named, may be waived by the party entitled to performance; and if such party thus waives the exact performance at the day, or if he goes on treating the agreement as still binding after default has been made, he cannot afterwards turn around and set up the delay or default as creating a forfeiture, and therefore, a defense.' (Pomeroy on Contracts, §337)" (Ibid., pp. 294-295).

"Where time was originally essential, but for sufficient cause a forfeiture for default therein has been waived, time ceases to be essential and becomes only material thereafter until the vendor again makes it essential by a proper notice and demand" (Ibid., p. 299).

"Having, by his conduct, waived the right of forfeiture for non-payment of the installments at the precise date of maturity, **he could not, after the whole became due, revive or renew it without previous notice accompanied by a tender of a deed**" (Ibid., p. 298).

"While not necessarily an absolute permanent waiver, yet in a court of equity there was at least such a temporary suspension of the right (of forfeiture) as could only be restored by his giving a definite and specific notice of an intention to that effect" (Ibid., p. 297).

"Nor will his right to the relief be cut off until the vendor places a limit to the lapse of time by a demand of payment at or before a specified day, and a notice that the agreement will be rescinded unless the demand is complied with, and the vendee's default thereon' (Pomeroy on Contracts, §404)" (Ibid., p. 299).

Cases from other States are in accord with this proposition as the following citations and quotations will show.

The notice must be "definite and specific."

Monson v. Bragdon, 159 Ill., 66;

Eaton v. Schneider, 57 N. E., 421;

Watson v. White, 38 N. E., 902.

The notice must be to the effect,

"that unless the other party performs his part of the agreement within a time designated (which must be a reasonable time), he will be deemed to have forfeited his rights thereunder."

Fargusson v. Talcott, 73 N. W., 207.

"* * * The rights of the vendee under the contract in the present case could not be put at an end immediately by tender to him unless notice had been previously given to him that strict performance would be required on that day."

Lawrence v. Miller, 86 N. Y. Rep., 134, and cases cited.

If payment on a designated day is waived,

"and if the vendor desires . . . payments due and unpaid to be paid, he must . . . notify the purchaser . . . that the money due and unpaid must be paid by a date designated, and if the purchaser fails to pay as required, the vendor may forfeit the contract and maintain ejectment for the possession of the land."

McCarty v. Myers, 5 Hun., 83-85.

The following additional California cases also recognize the rule:

Myers v. Williams, 173 Cal., 301, 304;

Stevinson v. Joy, 164 Cal., 279.

Springe, as we have seen, neither cleared his title nor gave to Brown any notice that he intended to tender a deed on a designated day or that he would demand a forfeiture if payment was not forthcoming on that day. As in *Lawrence v. Miller, supra*, he merely tendered a deed and such mere tender would not put an end to the contract.

Brown's Rights and Duties:

Brown's rights upon the facts as above stated are equally clear. He could not be compelled to take the property while the title was defective, nor could his payments be forfeited or his outlays for improvements be lost unless he should default in the final payment after Springe had cleared the title and tendered a deed to him upon due and reasonable notice. The authorities above quoted sufficiently illustrate this.

But while it is true that Springe could not forfeit Brown's payments and outlays without tendering a clear title and giving due notice, it is nevertheless equally true that Brown could not lawfully retain possession of the premises and at the same time fail or refuse to pay upon the ground that the title was defective. Under such circumstances Springe had the right to tender him a deed sufficient in form to convey to him such title as Springe had, and thereupon it became the duty of Brown either to get out or else accept the deed and make the final payment and waive all objections to the title.

Thus it is said in *Gervaise v. Brookins*, 156 Cal., 103-106-107:

"It appears to be well established that, under such circumstances, the vendee cannot retain possession of the land, while neglecting to pay the price when due, and that the failure of the title does not give him the right to continue in possession by merely keeping good an offer to perform on his part conditioned upon performance by the vendor. The reasons for this rule are thus stated by the Supreme Court of the United States in *Burnett v. Caldwell*, 9 Wall. (U. S.), 293: 'If the contract stipulates for possession by the vendee, or the vendor puts him into possession, he holds as a licensee. . . . The case comes within the category of a license. In such cases, the vendee cannot dispute the title of the vendor any more than the lessee can question the title of his lessor. The assignee of the vendee is as much bound by the estoppel as the vendee himself. Upon default in the payment of any installment of the purchase money, the possession becomes tortious and the vendor may at once bring ejectment.'"

Speaking further of the decision of the United States Supreme Court in said case of *Burnett v. Caldwell*, the opinion in *Gervaise v. Brookins* goes on to say:

"In that case the court further held that **the fact of want of title in the vendor, and the fact that the vendee had paid a large part of the price were alike immaterial as defenses to an action of ejectment by the vendor**" (Ibid., p. 107).

Many California cases to this same effect are cited in the course of the opinion in *Gervaise v. Brookins*, *supra*.

It is thus entirely clear that Springe had a right to recover in the action of ejectment, notwithstanding

the fact that his title was defective and notwithstanding the further fact that Brown had made large outlays upon the property and had paid some \$20,000.00 on the purchase price. Judgment in the ejectment suit was therefore properly rendered notwithstanding the fact that Springe was not in a position to perform his contract, because of his defective title, and notwithstanding the fact that he had given no notice of any intention to tender a deed upon a day certain and that he would exact a forfeiture if final payment were not then made.

But the important thing is that after surrendering up the possession, whether voluntarily or as a result of the ejectment suit, Brown had the right to recover back his cash payments and his outlays upon the property.

Haile v. Smith, 128 Cal., 415, 418, 419;

Heilig v. Parlin, 134 Cal., 99, 100.

Having thus concluded that Brown, the assignor, was entitled to recover these payments and outlays from the defendant in error, the only question which remains is that decided adversely to our contentions by the lower court, viz: Did the judgment in ejectment against Brown operate to estop him and his assignee from now claiming these moneys.

II.

THE JUDGMENT IN EJECTMENT IS NOT A BAR.

The judgment in ejectment merely directs that plaintiff "have and recover of and from the defendant, J. Dalzell Brown, . . . the possession of the real property hereinabove described, and of the whole thereof, together with said plaintiff's costs and disbursements . . ." (Tr., p. 99).

We submit that it is not possible that such a judgment can operate as a bar to the claim of plaintiff:

"§1911. What deemed adjudged in a judgment. That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

Code of Civil Procedure of California, §1911.

See also *Code of Civil Procedure of California*, §1908.

The case of *Haile v. Smith*, 128 Cal., 415, affords a strong analogy to the case at bar. It was an action of ejectment. The vendee pleaded want of title in the vendor. The defendant had made all payments save the last and had improved the property. The vendor had tendered a deed, but the vendee had refused to accept it on the ground that the title was bad. The court held the vendor entitled to possession, saying:

"If appellant desired to retain the possession which he

acquired under the contract he should have complied with his part of it; if he concluded not to comply because the title was not satisfactory to him, he was bound to restore possession to respondent. **Whatever cause of action he may have for the purchase money which he paid and for the value of his improvements is another matter; it constitutes no defense to the present action."**

Haile v. Smith, 128 Cal., 415, 419.

In *Burnett v. Caldwell*, 9 Wall. (U. S.), 293, the Supreme Court of the United States held, as we have already seen:

"That the fact of want of title in the vendor, and the fact that the vendee had paid a large part of the price, were alike immaterial as defenses to an action of ejectment by the vendor."

Gervaise v. Brookins, 156 Cal., 103-107.

It thus appears that it would have availed Brown nothing in the action of ejectment if he had elaborately set forth the want of title in his vendor. Being in possession he was precluded from raising the question. He was bound either to take such title as the vendor had or to get out. Precluded as he thus was from raising the issue as to title, it is to us incomprehensible how it could be thought that the question of Brown's right to recover back what he has paid is *res adjudicata*. What sense or justice would there be in such a rule?

The language of *Haile v. Smith* (*supra*) is directly to the contrary, and the court in holding that

the fact that payments have been made on the purchase price and for improvements is no defense in the matter, is very particular to say that:

“Whatever cause of action he may have for the purchase money which he paid and for the value of his improvements is another matter.”

Haile v. Smith, 128 Cal., 415, 419.

Heilig v. Parlin, 134 Cal., 99, is also strongly in point. There the suit by the vendor against the vendee instead of being in ejectment was brought to quiet title. The vendee filed a cross-complaint in which he demanded the return of the purchase money and the money expended for improvement. A general demurrer to the answer and to the cross-complaint was sustained. Defendant declining to amend, his default was taken and judgment was entered quieting the vendor's title. Thereafter the vendee brought suit to recover “back the money paid “out on account of the purchase price, and for improvements on the land,” and it was claimed that the judgment quieting title was *res adjudicata* as to the moneys paid, and justified their retention by the vendor. The Supreme Court held that the judgment quieting title and refusing to entertain the vendee's cross-complaint was not a bar. We beg to refer the court to the entire case as strongly analogous.

Certainly a judgment in ejectment stands upon no higher plane than a judgment quieting title; and if

there was a right in the vendee to recover the moneys paid the vendor in the case of *Heilig v. Parlin* notwithstanding the judgment quieting title and dismissing the cross-complaint, we submit that it is not possible that such a right does not attach in the present case.

It is no answer to say that Brown forfeited his payments by failing to formally rescind the contract; nor is it any answer to say that such forfeiture was accomplished by the fact that Brown resisted ejectment for a time.

There is no doubt but that upon the failure of defendant's title, Brown could have rescinded the contract and sued to recover his payments (*Gates v. McLean*, 70 Cal., 42-50).

True, Brown did not on demand surrender the possession, but did so only at the end of the ejectment suit; but he did not move for a new trial, and he did not appeal, and it would be strange indeed if the law would impose a forfeiture of a vendee's payments in order to punish him for having entertained the mistaken notion for a time, that he had a defense to the action of ejectment.

As already stated, Brown after the judgment in ejectment took no appeal therefrom; nor did he move for a new trial therein (Tr., p. 150); nor was his eviction effected by a writ of execution. Judgment was entered in the ejectment suit on the 26th day of May, 1908. On the 2nd day of June, 1908, Brown

quitted and surrendered up the possession to Springe (Tr., p. 151).

All that the law requires as a condition precedent to the recovering back of moneys paid on the contract or expended for improvements is either a surrender of the possession or proof of eviction. Thus it is said in *Rhorer v. Bila*, 83 Cal., 51-55:

"The law requires him to surrender the possession of the property, or prove an eviction therefrom, before permitting the defense of a failure of consideration, or a suit to recover the purchase price, or damages."

Moreover, the voluntary surrender of the premises after judgment was entered, without taking an appeal or moving for a new trial (Tr., p. 173), operated as a consent to the rescission of the contract. Thus in *Hicks v. Lovell*, 64 Cal., 14, the vendee repudiated the contract and at the same time continued to hold possession of the land. The court held that the vendor was neither bound to stand upon the contract and compel performance nor to recover damages for the purchase price, but that he had the right to bring ejectment to recover back his land, and that the preliminary notice to surrender possession followed by the ejectment suit gave the assent of the vendor to the repudiation by the vendee of the contract and put it at an end; the court saying:

"In so doing and giving the preliminary notice to surrender possession, he, too, gave his assent to the abandonment of the contract; and the parties who made it having thus by mutual assent rescinded it, its validity was gone and it ceased to exist."

Hicks v. Lovell, 64 Cal., 14-21.

So in the case at bar, Springe, although he failed to clear up his title and to comply with the contract, had the right by reason of the fact that Brown was in possession, to declare the contract at an end and to recover the possession, notwithstanding the fact that his title was defective. Springe's demand for surrender of the possession, his suit in ejectment and the subsequent surrender of the premises by Brown without motion for a new trial or appeal operated as an assent to the termination of the contract, and accomplished in effect an abandonment and rescission of the contract by mutual consent, and brings the case within the category of those cited in *Heilig v. Parlin* (*supra*), wherein it is said:

"In such case the vendee is clearly entitled to recover what he paid under and in pursuance of the contract so rescinded. (*Bohall v. Diller*, 41 Cal., 533; *Shively v. Semi-Tropic L. & W. Co.*, 99 Cal., 259; *Merrill v. Merrill*, 103 Cal., 287; *Glock v. Howard and Wilson Colony Co.*, 123 Cal., 15.)"

Heilig v. Parlin, 134 Cal., 99-102.

"The conduct of the parties, both being in default, the one demanding and the other surrendering the possession of the premises, amounted to a rescission of the contract."

Prentice v. Erskine, 164 Cal., 446, 450.

Far from forfeiting Brown's right to recover his money payments, and instead of operating as an

estoppel to set up those rights the judgment in ejectment operated in reality, as the foregoing authorities clearly show, to fix and confirm Brown's right to recover these moneys. The judgment in ejectment went no further than to restore the possession to Springe. The Supreme Court of California has recently said:

"It is the judgment, and not the preliminary determination of the court or jury, which creates the estoppel. Only that which is the matter directly adjudged, or which appears upon the face of the judgment to have been so adjudged, is conclusive between the parties. (Code Civ. Proc., secs. 1908, 1911.)"

Bank of Visalia v. Smith, 146 Cal., 398, 402.

This is in accordance not only with the Code of Civil Procedure, but in accordance with the general doctrine concerning *res adjudicata*. This suit is not upon the same cause of action involved in the ejectment suit, and the judgment is therefore not an estoppel. See particularly *Langdon v. Clark*, 221 Fed., 841; *Cromwell v. County of Sac.*, 94 U. S., 351.

For the foregoing reasons we respectfully submit that the judgment of nonsuit was erroneous and that the same should be reversed.

Respectfully submitted.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Plaintiff in Error.

No. 2956

IN THE

United States Circuit Court of Appeals ⁷

For the Ninth Circuit

POWER AND IRRIGATION COMPANY OF CLEAR
LAKE (a corporation),

Plaintiff in Error,

VS.

HEINZ SPRINGE,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

LUTHER ELKINS,

RICHARD P. HENSHALL,

Attorneys for Defendant in Error.

Filed this.....day of October, 1917.

FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk.

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POWER AND IRRIGATION COMPANY OF CLEAR
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Plaintiff in Error,

vs.

HEINZ SPRINGE,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in error, as assignee of one Edward O. Allen, who in turn was assignee of one J. Dalzell Brown, brought suit to recover certain moneys paid by J. Dalzell Brown for improvements erected by him on the lands of the defendant in error, Heinz Springe, and for certain moneys paid by the said J. Dalzell Brown and by his assignor, L. J. Shuman, upon the purchase price, pursuant to the terms of agreement of sale, of date September 20, 1906, where in the defendant in error, Heinz Springe, agreed to sell to the said L. J. Shuman and the said L. J. Shuman agreed to purchase from said Heinz Springe certain real

and personal property situate in Lake County, California.

The Court below granted defendant in error a non-suit on the ground that plaintiff in error is estopped by the judgment rendered in a certain action of ejectment in which defendant in error, Heinz Springe, was plaintiff and said J. Dalzell Brown plaintiff in error's assignor, by mesne assignment was the principal defendant, from proving upon the trial below:

(1) That J. Dalzell Brown, the assignee of the vendee in said contract of date September 20, 1906, was not in default in the payment of the final installment of the purchase price, pursuant to the contract of sale;

2. That the vendor, Heinz Springe, at any time was in default in carrying out any of the terms or provisions of the said contract of sale; or

(3) That there was a rescission by mutual consent of the vendor and vendee (or by the vendee) of the said contract of sale (Tr. pp. 174-182).

While it is not material to the matters for consideration before this Court, defendant in error unqualifiedly denies the statement appearing in the brief of plaintiff in error (pp. 1-2) as follows:

“The real meaning of said judgment of non-suit is that although plaintiff's assignor was *once possessed of a lawful and just claim against defendant, Springe, for approximately \$20,000.00 actual cash paid to Springe and for \$30,000.00 actually paid out for improvements on Springe's land, these just and valid claims*

were irretrievably lost, nevertheless, because, as the trial court conceives it, the judgment in ejectment is a conclusive determination against their validity. The purchase price which Springe agreed to take for the land was \$47,000.00 The judgment of nonsuit leaves in Springe's hands not only the land but also more than \$50,000.00 in cash and improvements." (The italics are ours.)

Adopting the method of counsel for plaintiff in error, we state that the "real meaning of said judgment of nonsuit" is that the plaintiff in error, the assignee, *once removed*, of J. Dalzell Brown, and who admittedly paid but \$1.00 for the assignment to it of a *possible right of action* by J. Dalzell Brown against the defendant in error shall not be permitted, six years after all of the rights of said J. Dalzell Brown, as vendee, under said contract of sale, had been foreclosed by a judgment rendered in an action of ejectment tried and determined in the Superior Court of the County of Lake, State of California, to come into the United States District Court for the Northern District of California and re-litigate the alleged or supposed rights of said J. Dalzell Brown, as vendee under said contract of sale, and to attempt to support such claim by a *theory* of its case and by *proof wholly different and inconsistent* with that presented by J. Dalzell Brown in the action of ejectment.

There is no warrant for the statement in the brief of plaintiff in error that J. Dalzell Brown was ever possessed of a "*lawful and just*" claim against the defendant in error, Springe, for the return to its as-

signor, once removed, J. Dalzell Brown, of any moneys paid on account of the purchase price of the lands described in the said contract of sale or for the repayment of any moneys expended by Brown in the erection of improvements upon said lands; neither is there any warrant for the statement in the brief of plaintiff in error that the non-suit leaves in Springe's hands more than \$50,000.00 in cash and improvements''. Some \$20,000.00 in all was paid to Springe on account of the purchase price of the land and personal property, \$8,000.00 of which was paid for the *live stock and other personal property*, which personally was received and *retained* by J. Dalzell Brown. There is *no evidence* that the *improvements erected by Brown were of any value to the defendant in error* or that they in the smallest degree increased the value of the real property referred to.

Statement of Facts.

We cannot wholly subscribe to the statement of facts as set forth in the brief of plaintiff in error. Briefly stated the facts are:

On September 20, 1906, one L. J. Shuman entered into a contract with the defendant in error, Heinz Springe, for the purchase and sale of certain real and personal property situate in Lake County, California (Tr. pp. 10-17). The purchase price for the real and personal property was \$55,000.00, of which some \$8,000.00 was for live stock and other

personalty and the remainder was for the realty (Tr. p. 13). The purchase price was payable in installments, all of which installments were paid except the final installment of \$28,500.00 and interest, which became payable on September 15, 1907 (Tr. p. 13). L. J. Shuman, the vendee, on September 20, 1906, assigned his rights under the contract to J. Dalzell Brown (Tr. pp. 65, 77). Brown, on December 15, 1906, entered into possession of the land, pursuant to the contract, and erected certain improvements thereon (Tr. p. 66).

The contract of sale provides the vendor shall furnish an abstract of title to the vendee on or before December 15, 1906; the vendee is allowed 30 days after receipt of the abstract within which to examine the title; objections to the title, if any, shall be reported to the vendor in writing within said 30 days, and if not so reported are to be deemed waived; the vendor shall remove defects rendering the title unmerchantable which shall be specified by the vendee in his written report of objections (Tr. p. 12). The contract contained the *specific provision*,

“but if said defects (excepting the securing of said patent) are not removed within a reasonable time, not to exceed 90 days after the receipt by the seller of said written report, the purchaser may, at his option, *insist upon the specific performance of the seller’s agreement to sell*, extend the time for the removal of said defects, or declare this agreement at an end, in which latter event the seller agrees to return to him the sum of money herein receipted for

and any further sums paid on account of said purchase price" (Tr. p. 12). (The italics are ours.)

The contract further provides that the delivery to the purchaser of a good and sufficient deed and payment of the last installment of \$28,500.00, the purchase price, "are concurrent conditions" (Tr. p. 13).

A written report, presenting some twenty objections to the title, was made on December 6, 1906 (Tr. p. 116).

Springe, not having removed to the satisfaction of Shuman, during the ninety days following December 6, 1906, all of the defects to the title pointed out by Shuman, Shuman notified Springe's attorney in writing that he *elected to insist upon the specific performance by the vendor, Springe, of his agreement to sell*, in the words following:

"Under the option granted me I elect to insist upon the specific performance of Mr. Springe's agreement to sell." * * *

Kindly advise me whether your client's declination to remove the defects specified is final. If so, I hereby give notice that I will hold Mr. Heinz Springe liable for all damages suffered or occasioned by reason of his refusal to remove the said specified defects" (Tr. pp. 126-127).

On April 16, 1907, defendant in error, Springe, notified the Shuman's attorneys that he would proceed to clear up certain of the objections made to his title (Tr. p. 128).

(NOTE: This was not a new contract by Springe, as is claimed by plaintiff in error.)

On May 7, 1907, Shuman, by his attorneys, wrote to Springe's attorneys that he waived certain objections made to the title, urging certain others (Tr. p. 129).

On June 19, 1907, Springe, by his attorney, wrote to the attorneys for Shuman advising them as to the progress made in curing the objections made to the title (Tr. p. 131).

Later there was additional correspondence between the attorneys of the vendor and vendee as to the clearing up of certain objections to the title (Tr. pp. 137-149).

On September 12, 1907, Springe had in San Francisco (for delivery to L. J. Shuman, the vendee, pursuant to his request) a deed from himself, Heinz Springe, to California Industrial Company of the property described in the contract with Shuman. At that time Springe was in Paris, France, and did not have an attorney in fact in San Francisco. On that date, J. Dalzell Brown, who had now become the assignee of Shuman, requested that Springe make out a new deed to the property *direct to himself, J. Dalzell Brown*. It was, of course, impossible for Springe at that late date to execute and acknowledge a new deed running to J. Dalzell Brown, as vendee, by the 15th of September, 1907, the date specified in the contract for the delivery of the deed and the payment of the final installment of the purchase price. So Brown, at the request of the attorney for Springe, in writing,

waived a written tender by Springe of a deed of the property to Brown on the 15th day of September, 1907 (Tr. pp. 141-142).

(NOTE: This waiver was wholly unnecessary and of *no effect* as we shall show *post*.)

It will be noted that no reference is made by Brown in his written waiver of any defects in Springe's title and there is no requirement therein that Springe's deed shall convey a "good record title" or "good merchantable title" (Tr. pp. 141-142).

(NOTE: The absence of any such requirement by Brown is most significant for, as we shall hereafter more fully point out, the vendee had previously elected to "insist upon the specific performance of Springe's agreement to sell" (Tr. p. 126); that is to say, *he had elected to pay the purchase price, demand delivery of deed from Springe and accept such title as Springe had*—and look to Springe, personally, for any damages he might suffer by reason of a defect in the title (Tr. p. 127)).

On October 29, 1907, Springe tendered a good and sufficient deed of the real property described in the contract of September 20, 1906, to J. Dalzell Brown and then and there demanded of Brown the payment of the final installment of \$28,500.00 and interest then due under the contract, but Brown then refused and neglected and has ever since refused and neglected to pay said sum so due or any part thereof (Tr. p. 94).

On or about the 10th day of December, 1907, Springe, who was then residing in Paris, came to California to determine what action should be

taken by him to *enforce* the said contract of sale of September 20, 1906, and to protect the said real property therein described (Tr. p. 143).

On or about the 14th day of December, 1907, defendant Brown, executed and delivered to Central Counties Land Company, a corporation, his contract to sell to said Central Counties Land Company, 1,700 acres of the lands described in said contract of date, September 20, 1906, at and for the sum of \$67,000.00 which contract bore date September 20, 1907 (Tr. pp. 77-78, 144-145).

(NOTE: The above constituted an affirmance by Brown of the contract of sale of September 20, 1906.)

On December 14, 1907, J. Dalzell Brown, executed and delivered to Central Counties Land Company a contract to sell to it the remaining 250 acres of said lands described in said contract of September 20, 1906, at and for the sum of \$64,000.00 (Tr. pp. 78-79).

(NOTE: The above was another affirmance by Brown of the contract of September 20, 1906.)

On the 17th day of December, 1907, Heinz Springe again tendered a good sufficient deed of said real property to J. Dalzell Brown and then and there again demanded of said Brown the payment of the said final installment of the purchase price under said contract of September 20, 1906, but Brown then and there again refused and ever since has refused to pay said sum, or any part thereof (Tr. p. 95).

On January 16, 1908, Heinz Springe demanded possession of the real property described in the contract of September 20, 1906, from J. Dalzell Brown, he then being in possession of said real property, but Brown again refused and neglected to deliver up the possession of said property (Tr. p. 95).

Thereafter, on the 16th day of January, 1908, at the County of Lake, State of California, defendant in error, Heinz Springe, brought an action in ejectment against said J. Dalzell Brown, in the Superior Court of the said County of Lake, State of California, said action being entitled, "*In the Superior County of the State of California, in and for the County of Lake, Heinz Springe, plaintiff, vs. J. Dalzell Brown et al., defendants, and being Superior Court No. 1789*" (Tr. pp. 146, 160).

Thereafter J. Dalzell Brown appeared in said action in ejectment by his attorney, Edward O. Allen, and filed his verified answer therein (Tr. p. 64), which answer is more fully referred to *post*.

Thereafter Central Counties Land Company, having obtained permission so to do, filed in said action in ejectment, its complaint in intervention, which is more fully referred to *post*.

Thereafter on the 25th day of May, 1908, the action in ejectment came on for trial, all parties appearing therein by their attorneys of record, and said cause having been tried before the Court, the Court having considered the law and the evidence,

submitted and filed findings of fact and conclusions of law and rendered its judgment therein in favor of the plaintiff, Heinz Springe and against the defendants, J. Dalzell Brown and Central Counties Land Company (Tr. pp. 91-100-150).

Said judgment in the action of ejectment was duly given and made against the defendants therein named, including the defendant, J. Dalzell Brown. That said judgment has not been set aside, modified or reversed and no appeal has been taken therefrom and that the same remains in full force and effect (Tr. p. 150).

Thereafter, on or about the 28th day of May, 1908, J. Dalzell Brown, in consideration of the sum of ten (\$10.00) dollars assigned to Edward O. Allen, his attorney, in the ejectment suit, all his right, title and interest under the agreement of date September 20, 1906, between Heinz Springe and Shuman (Tr. p. 148).

Thereafter on the 4th day of June, 1908, Central Counties Land Company, surrendered possession to Heinz Springe of his lands described in the contract of September 20, 1906, "in pursuance of the judgment recently rendered in ejectment suit" (Tr. pp. 151-152).

Thereafter, on or about the 24th day of April, 1913, Edward O. Allen, in consideration of the sum of \$1.00 to him in hand paid, sold, assigned and transferred to Power and Irrigation Company of Clear Lake, an Arizona corporation, the plaintiff

in error herein, the assignment made to him by J. Dalzell Brown of any and all rights accruing or to accrue thereunder (Tr. p. 149).

I.

THE RIGHTS OF THE PARTIES AS ESTABLISHED BY THE FOREGOING FACTS, CONSIDERED APART FROM THE QUESTION OF RES ADJUDICATA.

We cannot agree with plaintiff in error's statement of the reciprocal rights of Springe and of Brown under the contract between Springe and Shuman of date September 20, 1906, which rights and duties, as we see them are as follows:

Brown's Rights and Duties:

(a) Assuming that the vendee, Shuman, had pointed out in his written objections certain defects in Springe's title which Springe was unable to remove within the 90 days specified in the contract, he, Shuman, had the option to:

(a) "Insist upon the specific performance of the seller's agreement to sell; or

(b) "Extend the time for the removal of said defects"; or

(c) "Declare the agreement at an end, in which latter event the seller agrees to return to him the sum of money herein receipted for and other sums paid on account of said purchase price" (Tr., p. 12).

Brown, or rather his assignee, Shuman, elected to "insist upon the specific performance of the seller's agreement to sell" (Tr. pp. 124-125).

Shuman also at the same time notified Springe that he would also insist upon Springe removing the objections to the title which had been pointed out by him and which rendered Springe's title unmerchantable, failing which "I will hold Mr. Heinz Springe liable for all damage suffered or occasioned by reason of his refusal to remove the said specified defects" (Tr. p. 127).

From the foregoing, it appears that L. J. Shuman, the vendee under the contract, prior to the time that he assigned his rights under the contract to J. Dalzell Brown, had elected to purchase the property described in the contract of September 20, 1906, and to take such title as Springe was able to give; but with the proviso that in the event Springe should not remove the defects in the title pointed out that *he, Shuman, would hold Springe liable for damages suffered or occasioned by his refusal to remove such specified defects.*

Shuman (and his assignee Brown), having made such election on March 18, 1907, was thereafter required to pay the purchase price upon tender of a deed sufficient in *form* by Springe, conveying such title as Springe had, failing to do which he would be in default under the contract, not only by the specific terms thereof, but as a matter of law, and would forfeit all rights under the contract including all moneys paid on account of the con-

tract price or laid out or expended on the land.

“Where an objection to the title is known to the purchaser, he is bound to take a stand when his first payment falls due. His subsequent retention of possession and exercise of acts of ownership over the property prevent his recovery of his payment for such defective title.”

Caswell v. Black River C. N. W. Mfg. Co.,

14 John N. Y. 1817-453;

Bennett v. Hickey, 112 Mich. 379;

Corbett v. Schultz, 119 Mich. 249; 77 N. W.

947.

“Failure of merchantable title in vendor at time of entering into contract, was no justification for default of vendee in making payment.”

Barrows v. Harter, 165 Cal. 45.

The extention of time by Shuman to Springe for the curing of defects in Springe's title, while *inconsistent* with rescission, was *consistent* with specific performance; and the only course open to Shuman's assignee, Brown, for Springe's failure to cure defects within the extended time was to accept such title as Springe had, pay the purchase price upon tender of the deed and then bring a *suit to recover damages*, if any, suffered by reason of any defect in Springe's title.

Brown could not resist Springe's demand for the purchase price because of any defect in title, nor his demand for possession, in case of Brown's default in payment. Brown, therefore, by way of

cross-complaint, might have set up in the action of ejectment, his rights, if any he had, for damages suffered by reason of any defects in Springe's title; provided, of course, he had at the same time tendered in court, the purchase price due. In such event, the Court could grant any relief proper in equity.

Belger v. Sanchez, 137 Cal. 615.

But, as appears from the copy of the complaint in equity, marked Exhibit "E" to Brown's answer to the complaint in ejectment (Tr., p. 80), he, Brown, *was unable to tender payment*, and he had no equitable defense; and so he plead the flimsy defense that the tender was on a holiday and therefore he was not in default—a false defense, to be sure, as the Court found, but the only one he had.

Brown, even if he had *not* elected to require Springe to convey, notwithstanding certain alleged defects in the record title, could not, after tender of deed, rescind the contract *because of defects in the title* without *promptly* surrendering possession of the property. This he wholly failed to do.

Where the purchaser has remained in possession, treating the property as his own, and the contract in all respects as though it were binding and a subsisting contract, any defects in title or misrepresentations as to title are waived and he cannot recover back his payments.

Cross v. Mayo, 167 Cal. 604.

If the party entitled fails to rescind promptly he will be held to have waived his right to rescind.

Cross v. Mayo, supra;

Civil Code, § 1691;

2 Pomeroy on Equity, § 817; § 879.

It is of the essence of the right to rescind that prompt notice shall be given of the demand, and that the action shall be timely brought.

Evans v. Duke, 140 Cal. 26.

Neither was Brown permitted to effect a rescission of the contract (as is now claimed by his assignee) by "voluntarily surrendering the possession of the premises" to Springe after judgment in ejectment.

As was said in the case of *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 14, viz.:

"It would be to the last degree unjust and inequitable to allow a vendee, after his default under such a contract, to put the vendor in default by a mere tender. The practical effect of such a rule would be that a vendee without risk could speculate indefinitely in the land of the unfortunate vendor. The vendee would enter into a contract in which time would be declared of the essence, and stipulate under condition precedent, as in this case, to make payment at a certain time. Failing to make payment he would three months, six months, one year, or as in this case over three years, after the date of the failure, make an offer to perform, and if the land had risen in value, according to the theory of respondents here, could compel performance; but in every case he could recover the moneys paid."

The same rule, of course, would apply as to surrendering possession of the property after judgment, as it would where the vendee was merely in default. His status having been fixed as being in default, any act of the vendee thereafter could not, of course, restore his right under the contract.

The plaintiff in error in this action, successor in interest of Brown, would attempt to escape from the force of the foregoing decision by claiming that tender of the deed not having been made upon the date named in the contract, that the provision that time was of the essence of the contract was waived, and that time could not again be made of the essence of the contract so far as the payment to the vendee was concerned, until after reasonable notice served by the vendor upon the vendee of his intention to make time of the essence. This contention is without force.

In *Newton v. Hull*, 90 Cal. 491, the Court says:

“It is contended for appellant that because it does not appear that plaintiff tendered to defendants a deed of the land on the first day of November, 1888, when the third and last installment of the purchase-money became due, she was in default equally with the defendants; that ‘time being of the essence of the contract,’ the deed must have been tendered ‘at the time agreed upon, and at no other time’; and that by the mutual default of both parties ‘the contract came to an end, and cannot be enforced by either party.’ ”

* * * * *

“Undoubtedly, time is of the essence of the contract under consideration, so far as it is

expressed or implied that it should be so. It is expressly of the essence of the agreement on the part of the defendants to pay the last two installments of the purchase-money, and as to which they were put in default by the plaintiff's tender of a deed and demand of payment on the seventh day of February, 1889, three months after the last installment became due; but as to the agreement on the part of the plaintiff to convey the land 'on receiving such payment,' there was no default whatever, as there was no tender of payment by the defendants, or either of them." * * * "But the stipulation that time is of the essence of the contract seems to be applicable only to the agreement on the part of the defendants to pay the purchase-money, and to be intended for the benefit of the plaintiff alone." * * * "There is no provision in the agreement that the plaintiff should forfeit her right to the purchase-money in case the defendants should fail to pay it on or before the day on which it became due, nor in case she failed to tender a deed on that day, or at any time before the defendants tendered payment of the purchase-money. Nor was she bound to tender a deed, except upon tender of payment of the purchase-money." * * * "As we have seen, she could not be put in default, even after the purchase money was overdue, except by her refusal to convey *upon tender of the purchase-money*. She was therefore entitled, upon tendering the deed, to demand payment of the purchase-money on the seventh day of February, 1889, as she did, and upon defendants' refusal to pay, to bring this action."

Newton v. Hull, 90 Cal. 491, 493, 494.

See also,

Bradford v. Parkhurst, 96 Cal. 105;

**Haile v. Smith*, 113 Cal. 656.

(b) The waiver by Brown of the tender by Springe of a deed on September 15, 1907, was wholly immaterial and unnecessary.

For Brown, being in possession of Springe's land, pursuant to the contract, he waived all defects in title and all right to demand delivery of the deed, so long as he remained in possession of the property.

Cross v. Mayo, 167 Cal. 594.

(c) On tender of the deed by Springe to Brown on October 29, 1907 (and also on December 17, 1907), Brown *and his predecessor, Shuman, having elected to insist upon the specific performance of the contract*—it was his duty to pay the amount then remaining due under the contract, together with the interest, and receive such title as Springe was able to give and to be “content with the personal responsibility of the vendors, Springe, upon his conveyance,” to “convey a merchantable title.”

In *Gates v. McLean*, the Court says:

“* * * In the latter case, it is considered that he is willing to receive such title as the vendor is able to give and *he is content with the personal responsibility of the vendor upon his conveyance.*”

Gates v. McLean, 70 Cal. 42.

In *Haile v. Smith*, 128 Cal. 415, the Court says:

“In *Worley v. Nethercott*, 91 Cal. 512, 25 Am. St. Rep. 209—we quote from the syllabus, which is a correct summary of the decision—the law upon this point is stated as follows: ‘A purchaser of land in possession thereof un-

der a contract of sale, by the terms of which the vendor is to give a warranty deed of the property conveying a good and perfect title thereto, cannot, upon the tender retain both the land and the purchase money until a vendor's failure and inability to convey a good and perfect title shall be offered him, but he must pay the purchase price according to the contract, and receive such title as the vendor is able to give if he chooses to retain the possession of the land, or he may rescind the contract, restore the possession to the vendor, and recover the purchase money paid, together with the value of his improvements, after deducting therefrom the fair rental value of the premises; and if he fails and refuses to adopt either course, he is liable to an action of ejectment by the vendor.' "

This doctrine is approved in *Gervaise v. Brookins*, 156 Cal. 108, and cases cited.

In *Gervaise v. Brookins*, the Court says:

"This doctrine disposes of the case. Brookins is estopped from denying the title of Book while he retains the possession which he obtained from Book, in pursuance of the contract of sale. Hence, he cannot set up the want of title as an excuse for non-performance on his part. The proffered defense to the action for possession, founded on the failure and inability of the vendor's successor in interest to comply with Brookins' demand for a good title, must be disregarded because of the fact that he received his possession from Book, from whose successor he would now withhold it. His retention of the possession thus received binds him to pay the price and accept the vendor's title, *such as it is.*"

Gervaise v. Brookins, 156 Cal. 108.

(d) Brown, who was the assignee of Shuman, and having acquired Shuman's rights under the contract, on the 20th day of September, 1906, which *was subsequent to the date when Shuman elected to insist upon the specific performance by Springe of the contract and to look to Springe personally for any damages* which he might suffer in the event Springe should fail to convey to him a "merchantable title," *was bound by such election by Shuman, and was, therefore, bound to accept such title as Springe had,* and Brown having remained in possession of the property after notice and knowledge of any defects in Springe's title and having refused to surrender possession of the property to Springe, upon demand made by Springe therefor and tender of a deed good and sufficient in form, Brown waived any right which he at any time might have had to rescind the contract.

Cross v. Mayo, 167 Cal. 595.

In *Cross v. Mayo*, the Court says:

"It is unnecessary to cite authorities in support of the well settled proposition that a prompt disaffirmance of a contract by one entitled to rescind, upon discovery of the facts entitling him to rescind is essential, and that if he fails to rescind promptly, and to the contrary, continues to treat the contract as binding, he will be held to have waived his right to rescind and to have elected to affirm the contract. As it is stated in our Civil Code, 'he must rescind promptly, upon discovering the facts which entitle him to rescind.' (Section 1691): 'It is of the essence of the right to re-seission that prompt notice shall be given of

the demand, and that the action shall be timely brought. Upon obtaining knowledge of the facts entitling him to rescind, plaintiff should commence the proceedings for relief as soon as reasonably possible.' 'Acquiescence consisting of unnecessary delay after such knowledge will defeat the equitable relief.' (2 Pomeroy's Equity Jurisprudence, sec. 817). 'He is not allowed to go on and derive all possible benefits from the transaction and then claim to be relieved from his own obligations by rescission or refusal to perform on his own part. If, after discovering the untruth of the representations, he conducts himself in reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations.' (2 Pomeroy's Equity Jurisprudence, sec. 897.) It would seem to be unnecessary to multiply citations upon this principle of law so fundamental and so well settled.' Whether the party entitled to rescind has acted promptly is a question to be decided by the trial court upon the facts of the particular case. The evidence in this case was of such a nature as to support a conclusion that the defendant with full knowledge of the facts, was not ready to end the contract, and that, continuing to treat the same for his own purpose as valid and binding, he failed to make known any desire to terminate the contract for such a length of time and under such circumstances as to preclude the exercise by him of any right of rescission. (See, also, *Kornblum v. Arthurs*, 154 Cal. 246; (97 Pac. 420); *Marten v. Burns W. Co.*, 99 Cal. 357; (33 Pac. 1107); *Bailey v. Fox*, 78 Cal. 396, (20 Pac. 868).)"

Cross v. Mayo, 167 Cal., p. 594, quoting from pp. 604-605, and cases cited.

The above rule applies with a special force to the right of J. Dalzell Brown to rescind the contract of sale by reason of any defects in Springe's title; for it will be remembered that Brown, with full knowledge of the alleged defects in Springe's title, entered into possession of Springe's lands and erected costly improvements thereon; he paid several installments on the purchase price, and entered into contracts with Central Counties Land Company to sell the same lands to it at a greatly enhanced price; he refused to surrender possession upon tender of a deed by Springe sufficient in form and he made no objections to the tender of the deed; he refused to surrender possession of the property after refusal to pay the purchase price; and in the action of ejectment he denied Springe's title to the property, also his right of possession of the property and claimed ownership and right of possession in himself and his assignors, as vendees under Springe's contract; he also asserted title and right of possession under the contract, and alleged that he was not in default under the contract.

1. *Springe's Rights and Duties:*

(a) The final payment on the purchase price, under the contract, became due September 15, 1907, and the vendee, Shuman (and his assignee, Brown) having elected to take conveyance of such title as Springe had (Tr., pp. 125-126), Springe, upon tender to Brown on or after September 15, 1907, of a

deed sufficient in form, was entitled to demand and receive the final payment due under the contract, and in the event Brown should fail to make such payment, he had the right to declare Brown's rights under the contract forfeited, recover possession of his land, and retain any moneys paid on the contract price.

In *Skookum Oil Co. v. Thomas*, 162 Cal. 544, the Court said:

“It seems to us that the principles so clearly presented in *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, (* * *) are determinative of the questions here involved. It was there held that under a contract for the sale of real estate, in which time is made of the essence of the contract and performance by the vendee is made a condition precedent to a conveyance and upon breach thereof he is declared to forfeit all rights thereunder, including payments made thereon, the vendee cannot, after his default, without excuse shown therefor, by a tender of the amount due, acquire either an equitable or a legal right to maintain an action to recover back the moneys paid under the contract, nor can the purchaser, in such case, put the vendor in default by mere tender; nor can he elect to consider the contract at an end, and recover what he had paid on the contract, when the vendor has not abandoned the contract, but stands upon its terms and conditions, * * * the vendor's right to retain the purchase money, where default was unexcused, is independent of any express clauses in the contract for forfeiture of rights, or for the retention of the purchase money as liquidated damages, and that such express clauses are declarations in express terms of the

legal rights of the parties under such a contract, existing without them.”

Skookum Oil Co. v. Thomas, 162 Cal. 544-545.

See

Glock v. Howard, et al., 123 Cal. 1.

(b) If it be true (*which we deny*) as is claimed by plaintiff in error, that Springe waived the payment by Brown of the final payment under the contract on September 15, 1907 (Tr. pp. 140-142), still, by tendering a deed to Brown and demanding the final payment of the purchase price, Springe had the right to declare a forfeiture of all of Brown's rights under the contract, in the event Brown failed to pay *upon such tender and demand made* (*Newton v. Hull*, 90 Cal. 487).

All this was done by Springe. On December 17, 1907, he tendered a deed and demanded payment (Tr. p. 173). After tendering the deed on December 17, 1907, Springe made two demands upon Brown for surrender of the property but Brown refused to deliver. After that the ejectment suit was brought (Tr. p. 60). What more or greater notice could be required, in order to put Brown in default? Neither Brown nor *any of his numerous assignees*, even to this day, *has ever tendered the final payment to Springe*. Brown, in his answer in the ejectment suit, admitted the payment was due, and that tender of the deed was made, but plead that the tender was not sufficient because, *as he said*, it was made on a holiday (Tr. p. 67).

That allegation, of course, was not true, as was determined by the Court in the ejectment suit.

But it is not true that Springe ever extended the time of the payment of the final installment of the purchase price. Brown, the vendee, waived the tender of the deed on the day the final payment became due. But time was not of the essence of the contract *as to the time of the tender of the deed*, but *only as to the payment of the purchase price*. Springe was, therefore, entitled upon tendering the deed to demand payment of the purchase price and upon Brown's refusal to bring action.

Newton v. Hull, 90 Cal. 491.

There was no *act of forfeiture* required of Springe to put Brown in default. Under the terms of the contract the forfeiture of Brown was automatic. The language of the contract is as follows:

“But if the sale herein provided is not consummated under the terms and conditions of this agreement, by reason of the failure of the purchaser to pay the balance of the purchase price when due, as herein provided, then the sums of money paid the seller on account of the purchase price, and interest thereon, shall be forfeited and retained by the seller as liquidated damages, and the seller shall be thereafter released from all future obligation in law and equity to convey said lands, and may, at once, take possession thereof and re-enter the same.”

(c) If it be contended that the time for payment by Brown under the Shuman contract was extended by reason of the letter of September 12,

1907, from Brown to Springe, then it was only extended until Springe, by "all due diligence" should deliver a deed "upon payment of the balance of the purchase price" (Tr. pp. 140-141), that is, until Springe notified Mr. Brown that he was ready to deliver the deed, or, if you please, until the tender of the deed to Brown on December 17, 1907. It is not asserted or claimed in this suit that Mr. Springe failed to produce said deed with all due diligence. It therefore must be admitted that he did so.

But we deny that there was any agreement for the extension of the time within which Brown was authorized to make the payment under the contract. It was wholly proper and natural on the part of Springe's attorney, Mr. Levy, when Brown stated that he did not now want the deed to run to California Industrial Company but to himself direct, to say that "your contract provides that the payment is due on September 15, 1907. We cannot produce a new deed by that time, but in the event you insist upon a production of the new deed (which, by the terms of the contract, must be delivered simultaneously with the payment) you must waive that provision in the contract which requires us to make the tender simultaneously with the payment on September 15, 1907. You must give us a reasonable time within which to send back a new form of deed and have it executed and returned to you." And in response to that request Mr. Brown did waive, on his part, *that provision in the*

contract which required the deed by Springe to be delivered simultaneously with the payment of the money.

There is no proof whatever here that Mr. Springe ever waived the payment by Brown of the final installment on September 15, 1907, or the forfeiture of Brown's rights by reason of the failure to make such payment.

It is true that on December 17, 1907, as soon as the new deed was returned, Springe made a tender of it to Brown pursuant to the terms of Brown's letter, and the only effect of the tender of that deed was to establish beyond question any doubt as to whether or not Springe, by reason of accepting said letter from Brown, had agreed to the extension of the time of payment by Brown until such new deed could be executed and tendered. By making such tender Brown immediately became in default.

Under no theory, under the facts as offered by the plaintiff in error in this case, does it appear that there was any waiver that time was of the essence of the contract.

The theory of the learned counsel seems to be that it was the duty of Springe, under the Shuman contract, to tender a deed in order to put Brown in default. We submit that that was not the case at all. There was no requirement under the contract, or under the letter of September 12, 1907, for Springe to ever make any tender of a deed. All he was required to do was to "*with all due dili-*

gence cause to be delivered to me, upon payment of the balance of the purchase price due, a proper deed conveying the property under consideration to myself." In other words, Brown was required to make the payment on September 15, 1907, or be in default, or, at any rate, would be in default at the expiration of the time, however soon that time should be, when Springe should notify Brown that he had the deed ready for delivery upon payment of the money. As above stated, there was no requirement under the contract or in the letter that it was necessary for Springe to make a tender of the deed.

Newton v. Hull, 90 Cal. 487.

On the other hand, if it should be assumed that Brown had forfeited all his rights under the Shuman contract by failure to make payment on September 15, 1907, the tender of the deed by Springe to Brown on September 17, 1907, had no other or greater effect than that of an entirely new and independent offer to convey the property to Brown upon the payment of the amount specified in the demand at that time made, and Brown failing to make such payment, it merely remained an unaccepted offer and of no validity or consequence whatever. It did not, for the purpose of this non-suit, constitute a waiver by Springe of the prior forfeiture by Brown.

II.

THE NON-SUIT WAS PROPERLY GRANTED.

The motion for non-suit was made upon ten separate grounds as shown in the transcript (Tr. pp. 174-175). In his opinion, however, Judge Van Fleet considered but one, the eighth ground (Tr. p. 176), it appearing clear to him that the principal ground discussed was well taken and that any discussion of the other grounds was unnecessary. Of course, if it should appear to this Court that the non-suit was properly granted upon *any ground* assigned, the judgment must be affirmed.

1. *The Judgment in Ejectment Was a Bar.*

We will pass at once to a discussion of the eighth ground urged by the defendant in error on its motion for non-suit which was the one considered by Judge Van Fleet.

(a) It can very easily be shown, conclusively, that the precise issue sought to be litigated and determined in this action, to wit: whether or not

(1) Heinz Springe, the defendant in error, and vendor under the contract of sale, of September 20, 1906, was in default under said contract of sale;

(2) J. Dalzell Brown, the assignor once removed of the plaintiff in error, and assignee of the vendee under said contract of September 20, 1906, was in default under said contract of sale;

(3) Said contract of September 20, 1906, was rescinded by mutual consent of the parties; or

(4) Said contract of September 20, 1906, was rescinded by J. Dalzell Brown.

The complaint in this action was in the usual form of a complaint in ejectment (Tr. p. 60). Plaintiff therein, Heinz Springe, who is the defendant in error here, alleged in his complaint his ownership in certain real property described; that on a date named he was in possession thereof; that on said date the defendants, including J. Dalzell Brown, entered into possession and ousted the plaintiff; that the plaintiff on said date and ever since then had been lawfully entitled to the possession of the said real property; but that the defendants have ever since said date unlawfully withheld from the plaintiff the possession thereof, to plaintiff's damage, etc. The complaint ends with a prayer for possession of the property described in the complaint, and for the damages for withholding of it.

The defendant, J. Dalzell Brown, in his answer to the complaint in ejectment;

(1) Denies that the plaintiff, Springe, on the date named in the complaint, or at any time since then, was the owner or seized in fee of the real property described in the complaint;

(2) Denies that the plaintiff had been in possession of the real property, as alleged in the complaint, or that the defendant has ousted the plaintiff;

(3) Denies that the plaintiff, at the date named in the complaint, or at any time since then, was entitled to the possession of the real property;

(4) Admitted that the defendants had withheld from plaintiff the possession of the property; but

(5) Denies that such withholding was unlawful.

For his affirmative defense, defendant Brown alleged:

(6) The execution of the contract of sale of date September 20, 1906, by Heinz Springe, vendor, to L. J. Shuman, vendee (setting out a copy of it);

(7) The assignment by Shuman of all his right in said contract to the defendant Brown.

(8) The granting by Brown on the 20th day of September, 1907, of an option to Central Counties Land Company to purchase 1,700 acres of land described in the contract of sale of date September 20, 1906, for the sum of \$68,000;

(9) The granting by Brown on the 14th day of December, 1907, of a second option to Central Counties Land Company to purchase the remaining 250 acres of land described in said contract of September 20, 1906, for the sum of \$65,000;

(10) That on the 1st day of February, 1908, Brown had let Central Counties Land Company into the possession of all of the lands described in the complaint, and that said company had ever since been in full possession of said lands, and was holding the same, and claims the right to hold the

same by virtue of the above mentioned contracts;

(11) That since entering into possession of said property he, Brown, had erected extensive improvements thereon, of the reasonable value of \$40,000.00;

(12) That he, Brown, had paid Springe all installments of the purchase price as provided in the contract of date September 20, 1906 (a copy of which marked Exhibit "A" was appended to the answer and made a part thereof), except the last installment thereof, to wit: \$28,500.00, and interest thereon at the rate of 6½% from June 15, 1907, "and said last installment and interest are now due and payable to plaintiff".

(13) "That on the 18th day of December, 1907, plaintiff (Springe) tendered to defendant a document purporting to be a deed conveying said property to defendant, and at the same time demanded the above mentioned sum of \$28,500 and interest. That said 18th day of December, 1907, was a legal holiday, and that no further tender of a deed conveying title to the said property has been made by plaintiff to defendant; and defendant is informed and believes, and on that ground alleges that no such tender has been made to anyone else."

(14) That Central Counties Land Company is a necessary party to the action, and that a complete determination of the action cannot be had without bringing in said company.

(15) "That said Central Counties Land Company has brought a suit in equity against the plaintiff Springe and defendant Brown for a determination of its rights to the above mentioned property * * * and that said suit

will more fully determine the same cause of action and the rights of the parties hereto as are the subject of the action herein."

(16) The defendant then prays that the Central Counties Land Company be made a party; that the action of ejectment be abated, and that the defendant be dismissed with his costs, etc.

Attached to the answer of the defendant Brown, and made a part thereof, were the following exhibits:

Exhibit "A" was the contract of date September 20, 1906, which is the Exhibit "A" to the complaint in this action.

Exhibit "B" is the assignment by Shuman, the vendee, under the contract of September 20, 1906, to Brown, of all his rights under that contract.

Exhibit "C" is the option which Brown gave to Central Counties Land Company to purchase 1,700 acres of the lands described in the contract of September 20, 1906.

Exhibit "D" is another option given by Brown to Central Counties Land Company to purchase the remaining 250 acres of the lands described in the contract of September 20, 1906.

Exhibit "E" is a copy of the complaint in equity of the Central Counties Land Company against Brown and Springe, and the substance of which, as it was introduced by plaintiff in error as a part of his case, ought to be stated to this Court. That complaints sets out substantially all of the matters

set forth in the answer of the defendant, Brown, in the action of ejectment, also the following:

(a) "That on the 23rd day of September, 1907, the plaintiff tendered to defendant, Brown, in the city and county of San Francisco, State of California, by its secretary, Edward O. Allen, thereunto duly authorized, a written offer of performance of the above mentioned contracts of September 20, 1907, and December 14, 1907, respectively.

That then and there defendant Brown stated that he could not deliver to plaintiff the deed conveying a good title to the above described property, for the reason that he had not yet received a conveyance of said property from defendant Springe.

Plaintiff furthermore is informed and believes, and on that ground alleges that defendant Brown has not received a conveyance of the said property from defendant Springe for the reason that the defendant Brown does not possess sufficient funds to pay the amount due said Springe under the first above-mentioned contract of sale" (Tr. pp. 83 and 84).

(b) An allegation is made to the effect that plaintiff is able to carry out its obligations under the option contracts given to it by Brown.

(c) The prayer of the complaint was to the effect that Central Counties Land Company be substituted for all the interests of defendant Brown in the property, and that the defendant Springe be required to convey to plaintiff the property in question, upon payment of the amount due him under the original contract of sale, etc.

Central Counties Land Company appeared in the action of ejectment and requested permission to file therein a complaint in intervention, which permission was granted and a complaint was filed. In its complaint in intervention it alleged by reference practically all of the allegations set forth in its said complaint in the suit in equity above referred to, and the said other exhibits attached to the said answer of Brown in said action of ejectment.

It also alleged that Albert B. Southard and John A. Black were necessary parties to the action. In its prayer it asks that the said Albert B. Southard and John A. Black be made parties to the action, that an amended complaint be served on them, and that it, Central Counties Land Company, be permitted to plead to said complaint.

All of the parties appearing in the action of ejectment appeared at the trial, by their attorneys of record (Charles S. Wheeler, attorney for plaintiff in error here appearing by J. B. Kennedy, Esq. for Central Counties Land Company). Up to the time of the trial, and until after entering judgment, all of the defendants and intervenors appearing in said action urged their defenses to the complaint therein. The court made findings of fact and gave judgment as set forth on pages 91 to 99 of the record.

2. Under the California practice, a judgment is embodied in a judgment roll.

C. C. P., § 670.

The papers constituting the judgment roll, where there has been a trial, include the pleadings, the findings of the Court and the judgment (Subd. 2). In the instant case the plaintiff in error introduced the findings of fact and conclusions of law in the case of *Springe v. Brown* (Tr. p. 91). From those findings it appeared that the Court expressly found against the assignor of the plaintiff in error everything which Brown tendered in his answer in that case including the precise issue which the plaintiff in error seeks to litigate in this case.

It found, for example, in Finding I that the plaintiff, Springe, was the owner of the property.

In Finding II, that on the 20th day of September, 1906, while Springe was the owner of the property, he executed the contract referred to in the answer of Brown in that case, marked Exhibit "A" and annexed to the answer.

It found in Finding III that the vendee, Shuman, made a contract with the defendant Brown, which is set forth as Exhibit "B" to Brown's answer. And in Finding IV that on December 14, 1907, Brown delivered to the Central Counties Land Company two contracts, referred to and marked Exhibits "C" and "D" to the answer of Brown; and found in Finding V that from the 15th day of December, 1906, to and until the 1st day of February, 1908, the defendant, Brown, was in possession of the real property under the con-

tracts referred to; and in Finding VI, that on the 1st day of February, 1908, he surrendered possession to the Central Counties Land Company, the intervenor therein, which took possession of said property and which has ever since been and now is in possession of it, claiming to hold the same by virtue of the contract, Exhibit "A", and the other contracts referred to.

In Finding VII it found that neither Brown nor the Central Counties Land Company had ever paid or offered to pay or tendered to the plaintiff, Springe, the last installment which fell due under the terms of said Shuman contract and that *they have wholly failed, neglected and refused to pay said last installment.*

It expressly found in Finding VIII that on the 29th day of October, 1907, Springe tendered a *good and sufficient deed of the property to Brown* and demanded payment of the balance due from him *and that Brown then refused and neglected and has ever since refused and neglected and still refuses and neglects to pay said amount.*

It found in Finding IX that on the 17th day of December, 1907, plaintiff, Springe, *tendered a good and sufficient deed of the property to J. Daltzell Brown* and demanded payment of him of the balance then due, which Brown then refused and still refuses to pay.

It found that on the 16th day of January, 1908, plaintiff, Springe, demanded possession of the

premises of *Brown, who was then in possession of the property, by his agent, and who refused to deliver it.*

As conclusions of law from these facts the Court found that the plaintiff was and still is the owner of the property and is entitled to the possession of said real property and the whole thereof, and second, that Central Counties Land Company, intervenor herein, is not entitled to any relief. The judgment in conformity with these conclusions of law was entered.

It seems to us too plain for argument that the identical issues involved in this case were expressly determined by the court against the contentions of the assignor of plaintiff in error in that case, and that for the plaintiff in error to attempt to maintain the position which he takes in this case is simply to attempt to relitigate the matters which were expressly adjudged against him in the former suit.

It should be remembered that the Central Counties Land Company was expressly averred by the defendant, Brown, in that case to be a necessary party to that action, and the various contracts which the defendant, Brown, had made with the Central Counties Land Company were set up in Brown's answer together with the suit which the Central Counties Land Company had instituted against both Brown and Springe (Tr. pp. 66-68).

It was also alleged by Brown that he let said Central Counties Land Company into the property and that it was now holding the same pursuant to these contracts—being the contracts between Brown and Central Counties Land Company, and which are set forth as Exhibits “A”, “B”, “C” and “D” to his answer on pages 69 to 79 of the record.

Every claim, legal and equitable, of Springe, Brown, the Central Counties Land Company, and every other party, was presented to and laid before the Court in that case and its judgment prayed thereon. *It found* not only *by direct implication*, but by *specific adjudication* everything against Brown and the Central Counties Land Company, and it is too plain for argument that its determination upon that point is conclusive upon the parties and their privies in every other tribunal.

The cases cited by counsel, upon which he relies,—*Haile v. Smith*, 128 Cal. 415, and *Heilig v. Parlin*, 134 Cal. 99,—are easily distinguishable from the case at bar and when properly understood are fully in accord with the ruling of the Court below.

The first case,—*Haile v. Smith*,—is an authority against the plaintiff in error upon another point, but it has no bearing upon the question of estoppel by judgment nor was the question which is here involved decided or even discussed in it. That was an action of ejectment and the question before

the Court was whether or not a vendee who was in possession of the property under a contract from his vendor could aver, in an action by the vendor against him to recover possession of the property, that the vendor had not a good and complete title to the land and therefore could not maintain the action. As the Court says, referring to the vendee, page 418:

“His position really is that, under his view of the facts, he may indefinitely keep possession of the land while refusing to make payment of the purchase money. But this he cannot do. He received possession of the land from respondent under the contract, and can retain possession only by fulfilling his covenants which he therein made. He cannot keep both the land and the purchase money. It is not necessary, therefore, for the purposes of this case, to determine definitely whether or not respondent has a good and sufficient title. If appellant desired to retain the possession which he acquired under the contract he should have complied with his part of it; if he concluded not to comply because the title was not satisfactory to him, he was bound to restore possession to respondent. Whatever cause of action he may have for the purchase money which he paid and for the value of his improvements is another matter; it constitutes no defense to the present action.”

This case decides simply, of course, that the vendee can not refuse to surrender possession of the property upon the ground that the vendor has not title,—obviously a correct conclusion. And it was in connection with the claim that the vendor, in fact had *no title* to give to the vendee,—that the

Court uses the language that whatever cause of action he may have for the purchase money and for the value of the improvements was another matter,—meaning, of course, that so long as he remains in possession of the property he could not dispute the title of his vendor.

The second case, *Heilig v. Parlin*, 134 Cal. 99, is not in conflict with the foregoing. In that case the vendee, under a contract of sale, failed to make a payment which was due on February 2, 1895. The vendor then on February 10th, eight days thereafter, served a notice in writing in which,—

(a) He demanded a surrender of the possession of the land; and

(b) Notified the vendee that the contract “was absolutely abandoned and determined because of the failure to make said payment.”

Soon thereafter the vendor took possession of the land, apparently by force, and thereafter and on March 19, 1895, he commenced an action in the Superior Court to quiet title to the land. In this action the defendant answered and filed a cross-complaint in which he set out the contract between the vendor and the vendee and alleged due performance up to the date of the ouster and prayed judgment on the cross-complaint for the amount of the purchase money paid and expended under the contract. The plaintiff’s general demurrer to this cross-complaint was sustained and the de-

fendant thereupon, declining to amend, his default was taken and judgment was entered in favor of the plaintiff, quieting the title to the land.

The question presented was whether or not this judgment was an estoppel in a subsequent action to recover the moneys paid on the contract as moneys laid, paid out and expended, and it was held that this judgment was not an estoppel. The reason is not far to seek.

In the first place, it appears that the plaintiff in bringing his suit to quiet title was not standing on the contract. He had, in fact, *rescinded* the contract; for it appears that he notified the other party prior thereto that the *contract was "abandoned and determined"*. He was entitled to the possession of the property, therefore, not because of the failure to make payment under the contract, but because the contract of sale was terminated and *rescinded*. This termination and *rescission* which it will be observed took place before the suit, gave rise, of course, to a claim in favor of the other party for his moneys which he had paid under the contract. But this claim could not properly be set up in the suit to quiet title.

In the second place, it was an admitted fact in the pleadings in *Heilig v. Parlin* that the contract referred to had been *rescinded*; and of course, in that event, the party was entitled to recover his money back. In this regard the Court says:

"In the present case, however, the complaint directly alleges a rescission on the part of the

vendor, Parlin, *and this allegation is not denied in the answer.*”

In the case at bar the rescission of the contract is expressly *denied* and it was in fact expressly disproved on the trial; for Springe did not rescind the contract with Brown, he affirmed it and alleged a breach of it by Brown.

In the third place, as the Court notes:

“The cross-complaint in the action to quiet title did not aver that the contract, in reference to which the money had been paid and expended, had been rescinded. It may have been for that reason that the court sustained the demurrer on the ground that it failed to state a cause of action.”

While it is true that a judgment upon demurrer is as good an estoppel as is any other form of judgment, it might very well be as is held in that case, that it is not an estoppel where in an action to quiet title the cause of action attempted to be set forth in the cross-complaint had no proper place in the action to quiet title; and as the Court very properly says:

“The only thing appearing upon the face of the judgment to have been adjudged in the former action is the title of Parlin, the plaintiff herein, to the land in question, and his right to have such title quieted, and that judgment was entered upon the default of the defendant, the plaintiff here, which was an equivalent to a disclaimer on his part to any claim or title to said land. In other words, he acquiesced in the rescission of the contract on the part of Parlin,

and falls back upon his right resulting from such rescission to recover the money paid, laid out and expended while the contract subsisted.”

In the case at bar, as we have remarked, there never has been, either in the action of ejectment of *Springe v. Brown et al.* or in this action, any rescission of the contract. And the *fact* of *rescission* is the foundation of the decision in the case of *Heilig v. Parlin, supra.* This leads us to remind the Court that the complaint in *the case* at bar alleges specifically that Springe brought an action of ejectment to recover the possession thereof and “thenceforth repudiated the aforesaid contract and agreement and abandoned the same and treated the same as rescinded”. This allegation of the complaint was specifically denied in the answer except in so far as it relates to the action of ejectment. The proof shows no rescission whatever of the contract, but, as we have pointed out, establishes conclusively that Springe stood upon the contract and standing upon it brought ejectment to oust the other party from his possession under the contract, because he had defaulted in it.

3. Even without particularizing with respect to the exact issues in the action of ejectment referred to, it must appear at once that the judgment rendered therein is necessarily a bar to this action.

All we need to consider in this action is that the vendor, Springe, the defendant in error, in the action of ejectment referred to, *claimed* that the vendee, Brown, *was in default* under the contract

of date September 20, 1906; and that Brown in the same action of ejectment, claimed that he was *not in default*—because the tender of the deed by Springe to him and demand for final payment under the contract were made upon a *legal holiday*. If the claim of Springe in the action of ejectment was established by the judgment of the Court, then Brown and his assignees are estopped forever after from controverting *the fact* of Brown's default under the contract.

A vendor cannot prevail in an action of ejectment against his vendee in possession when the latter asserts his right to continue such possession pursuant to a contract of sale under which he took such possession, without showing that he, the vendor, is

- (a) Not in default; and
- (b) That the vendee is in default.

A judgment, therefore, in favor of the vendor in an action of ejectment, where the vendee is in possession under a contract of sale, and is asserting his right to hold such possession, pursuant to the contract, cannot be rendered without a determination in said action that the vendee is in default under the contract. And such determination is conclusive and binding upon the parties so long as that judgment stands.

In the present instance, without looking any further into the record, we find that the vendor, Springe, prevailed in the action of ejectment; that

the Court gave judgment for him against the vendee, Brown; and we know that this judgment could not be rendered unless the trial Court in the action of ejectment had found the vendee, Brown, to be in default. The successor of the vendee, J. Dalzell Brown, therefore, is *estopped* to urge in this Court, and in all other courts, (1) that his assignee, Brown, was not in default under the contract of sales; (2) that the defendant in error, Springe, was in default under the contract of sale; or (3) that the contract of sale was rescinded by mutual consent of Springe and Brown or by Brown. This being so, the plaintiff in error, of course, cannot recover in this—or in any court—the moneys paid under the contract of sale. For, the right of a vendee, under a contract of sale, to recover moneys paid by him to the vendor, exists only when the vendee, himself, is not in default and the vendor is in default, or where the contract has been rescinded by mutual consent of the vendor and vendee, neither of which conditions exists in this case.

This particular view was the view which appealed to the judge of the Court below and we think that the law on this point could not be better stated than in the language of Judge Van Fleet, as follows:

“The rule is aptly stated by Mr. Freeman in his very excellent work on judgments as to what is concluded by such an adjudication. ‘An adjudication,’ says Mr. Freeman, ‘is final and conclusive not only as to the matters actually determined, but as to every other

matter which the parties might have litigated, and have decided as incidental to or connected with the subject matter of litigation, and every matter coming within the legitimate purview of the original action both in respect to matters of claim and of defense. * * *

‘The defendant must bring forward all the defenses which he had to the cause of action asserted in the plaintiff’s pleadings at the time the action was commenced.’

And again: ‘To render a matter *res judicata*, it is not essential that it should have been distinctly and specifically put in issue by the pleadings.’

Now, in this case, we have this situation. Here was this contract of sale and purchase. Under its terms the purchaser was put in possession. He made the first payments, and it came down to the point of final payment. He failed to pay under circumstances which, in the judgment of the plaintiff to the action constituted a breach, whereupon by a course thoroughly well established as to the rights of the parties under circumstances, he brought his action in ejectment to oust the purchaser. While that action, independently considered, did not essentially involve the contract, in this instance it was based upon the contract because, necessarily, the plaintiff in the action could not recover unless he established a breach by the defendant under that contract.

It may be conceded, as has been suggested, that, had Mr. Brown seen fit to refuse to appear, or had simply put in a negative defense and let judgment go,—I am willing to concede that the judgment would have concluded nothing except the question as to the right of possession. But he did not do that. He saw fit not only to interpose his negative response to the title of the plaintiff, but he set forth his supposed rights under this contract whereby

he sought to establish the fact that he was holding within its terms. When he did that, he submitted the entire controversy, not only as based upon what was in those pleadings, but whatever he might have stated in the way of defensive matter to show that he was not in default under that contract. We took the ground in his defense to that action that the plaintiff was not entitled to recover because, notwithstanding the last payment had not been made in accordance with the terms of the contract,—which he admitted to be then due and payable,—that the plaintiff had failed to tender to him a deed which would carry a merchantable title. He stood upon that defense, and it was adjudged against him. Now, mind you, if he had a good defense in connection therewith which would have shown to the court that in fact, by reason of the subsequent agreement between the parties, time as the essence of the contract had been waived as to the payment which remained to be made, and that no subsequent notice had been given him; and that, therefore, he was not in default in that last payment, unquestionably the judgment must of necessity, had the fact so found, gone in his favor, because that would have shown that the action in ejectment was premature; that the plaintiff in fact had no cause of action, because of the existence of this contract, and which, supplemented by the subsequent arrangement between the parties, would have shown that the last payment was not in fact due, and that, therefore, as the matter then stood, Mr. Brown was rightly in possession until such time as he was put by proper notice to the necessity of meeting the last payment; and that, of course, would have rested upon the tender to him of a proper deed conveying title. He did not do that. He rested upon the defense that I have indicated. Now, under, the rule that I have stated as to what

is included in a judgment under such issue it seems to me that that was his own fault. If he had such a defense as is now claimed, he should have pleaded it in his answer, in accordance with the facts; and if sustained, he would undoubtedly have prevailed. He failed to do that. He set up a state of facts at variance indeed with what his assignee now claims to have been the real facts of the transaction. But the whole controversy was submitted to the court under those pleadings. The fact that there was the defect in Brown's defense as the evidence now would tend to disclose, could make no difference. The question that was in issue in that case,—and carrying with it everything essential to a judgment upon the issues,—was the question of possession. And when the court determined under the issues that were there presented that the defendant was in default under this contract, and that, therefore, the plaintiff was entitled to possession, it necessarily included a finding of everything which the defendant might have set up in that connection which would have tended to a different conclusion. That is the case as it presents itself to my mind, and I am unable to see my way clear to avoid the conclusion that results from it."

That Judge Van Fleet was correct in his statement regarding the law and his application of that law to the present situation is hardly open to question.

It is established law that a judgment in an action is an estoppel between parties and their privies in any subsequent proceedings involving the *same cause of action*, not alone upon everything which

was litigated but upon everything which might have been litigated in that action.

In *Bingham v. Kearney*, 136 Cal. 177, the Court says:

“It is the rule, long recognized in this country, that a judgment between the same parties is conclusive, not only as to the subject-matter in controversy in the action upon which it is based, but also in all other actions involving the same question, *and upon all matters involved in the issues which might have been litigated and decided in the case*, the presumption being that all such issues were met and decided. It is the policy of the law to put an end to litigation, and to aid the vigilant and not those who sleep upon their rights. It is not the policy of the law to allow a new and different suit between the same parties, concerning the same subject-matter, that has already been litigated; *neither will the law allow the parties to trifle with the courts by piecemeal litigation*. When plaintiff was brought into court by defendant in the former case, she certainly knew her rights. If she wished to rescind the contract, or if she had rescinded it, as she said in her answer she had done, then and there was the time to present her pleadings and evidence and insist upon all rights to which she was entitled under the law. If she could not get the award of the law upon the facts in the lower court, she could have appealed. She did not do so. She is now met by the presumption that all the facts and matters in controversy were disposed of in the former suit, and the further presumption that the judgment in the former suit is correct. If she failed to assert her claim properly, or to present the proper evidence in the first suit, she will not now be permitted in a second to litigate it. The

principles herein stated are elementary. They are stated in the late case of *Quirk v. Rooney*, 130 Cal. 510." (The italics are ours.)

Bingham v. Kearney, 136 Cal. 177.

In *Belger v. Sanchez*, the Court says:

"In an action of ejectment, where the defendant by cross-complaint sets up a contract of sale executed by the plaintiff, under which he entered into possession, and claims performance on his part and non-performance on plaintiff's part, it is competent for the court finally to adjudge the rights of both parties under such contract."

Belger v. Sanchez, 137 Cal. 615.

See also,

Greer v. Greer, 142 Cal. 519;

Allen v. Allen, 159 Cal. 195;

Estate of Bell, 153 Cal. 331.

It has been held that a judgment in a suit of ejectment is *res adjudicata* as to all rights in property at the time of trial.

Thrift v. Delaney, 69 Cal. 191;

Marshall v. Shafter, 32 Cal. 176.

In *Reed v. Cross*, 116 Cal. 473, the Court says:

"A judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal, or other proceeding providing for its revision."

The *default* of Brown, having been established in the action of ejectment, it effectively forfeits all his rights under the contract, and the vendor has an absolute right to consider it forfeited.

Commercial Bank v. Weldon, 148 Cal. 601;
Skookum Oil Co. v. Thomas, 162 Cal. 539.

Another branch of this proposition is, that even a matter which is not properly litigable in a controversy, but which is brought into the controversy by a party to it and litigated, is concluded by the judgment. As fine an illustration of this principle is presented by an action to foreclose a mortgage, which, it is familiar law, does not involve an issue as to the title to the property. Nevertheless, if the parties choose to litigate the question of title, the judgment is conclusive upon that question.

See

Cromwell v. County of Sacramento, 94 U. S. 351.

See also

Bingham v. Kearney, 136 Cal. 177, *supra*.

In the present case the judgment is conclusive upon either theory, for, as we pointed out under I, *supra*, a judgment ousting the vendee from his possession of the property under a contract of sale cannot be rendered in favor of the vendor unless it is adjudged that the vendee is in default under the contract.

See cases, *supra*.

III.

OTHER GROUNDS FOR NON-SUIT.

In addition to urging the correctness of the judgment of the lower Court in granting defendant in error's motion for non-suit, upon the ground that the judgment in the action of ejectment was *res adjudicata* and a bar to the action by plaintiff in error, we also urge each and every of the remaining nine grounds for non-suit, presented by defendant in error on the trial below. We submit that it affirmatively appears from the foregoing brief that each and every of the said grounds for non-suit urged were well taken.

It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco,
October 15, 1917.

LUTHER ELKINS,
RICHARD P. HENSHALL,
Attorneys for Defendant in Error.

IN THE
United States Circuit Court of Appeals 8
FOR THE NINTH CIRCUIT

POWER AND IRRIGATION COMPANY OF CLEAR
LAKE (a Corporation),
vs.
HEINZ SPRINGE,
Plaintiff in Error,
Defendant in Error.

**Syllabus of Points of Law Made in the Oral
Argument of Charles S. Wheeler, for
Plaintiff in Error.**

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Plaintiff in Error.

Filed this.....day of October, A. D. 1917.
FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk

The James H. Barry Co.
San Francisco

FILED

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F. D. MONCKTON,
Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

POWER AND IRRIGATION COM- PANY OF CLEAR LAKE (a Cor- poration),	}	<i>Plaintiff in Error,</i>
vs.		
HEINZ SPRINGE,	}	<i>Defendant in Error.</i>
		No. 2956.

SYLLABUS OF POINTS OF LAW MADE IN THE
ORAL ARGUMENT OF CHARLES S. WHEELER,
FOR PLAINTIFF IN ERROR.

The following propositions afford the juridical basis for plaintiff's case. An understanding of them is therefore essential to a proper consideration of the question of *res adjudicata* which is the ultimate question of law in the case:

(a) When a vendee has entered into possession under an executory contract of purchase, and the vendor is unable to comply with his covenant to furnish a good title, and the vendee fails to make the payments required by the contract, both parties are in default and therefore neither can recover *on the con-*

tract against the other without first fulfilling his obligations thereunder.

3 *Elliott on Contracts*, Sec. 2098.

(b) When the vendee has entered into possession under the contract he has no right to remain indefinitely in possession unless he is willing to pay in full and to accept a deed conveying whatever title the vendor has to give.

Gervaise v. Brookins, 156 Cal., 103;

Haile v. Smith, 128 Cal., 415.

But in such cases—*both parties being in default*—either can elect to treat the contract as rescinded and recover from the other—not on the contract, but on an implied promise—whatever he has given to the other in part performance.

Glock v. Howard etc. Co., 123 Cal., 10 and 16;

Cleary v. Folger, 84 Cal., 316;

Phelps v. Brown, 95 Cal., 572.

(c) Notwithstanding the vendor's own default in the matter of title, the vendee by retaining possession and by failing to pay up, is regarded in law as holding out to the vendor a continuing offer to rescind and abandon the contract; and the vendor, if he so elects, may demand possession and sue in ejectment to recover the land. Such demand for possession followed

by a suit in ejectment operates in law as an acceptance of the vendee's implied offer to abandon and rescind.

Thus it is said in *Hicks v. Lovell*, 64 Cal., 21:

" 'The refusal of one party to perform his contract,' says the Supreme Court of New York, in *Graves v. White*, 87 N. Y., 465, 'amounts on his part to an abandonment of it.' . . . In the present case such refusal was proved. The defendant undertook to repudiate the contract and at the same time held the possession under and by virtue of it. . . . the plaintiff . . . had the right to bring ejectment to recover back his land. In so doing, and in giving the preliminary notice to surrender possession, **he, too, gave his assent to the abandonment of the contract; and the parties who made it having thus by mutual assent rescinded it, its validity was gone and it ceased to exist. Neither party, thereafter, could invoke its terms or protection as against the other.**"

(d) Such abandonment and rescission as the above quotation shows need not be express; but it may just as well be evidenced by the acts and conduct of the parties.

See also:

Gwin v. Calegaris, 139 Cal., 390-1;

Drew v. Pedlar, 87 Cal., 443;

Carter v. Fox, 11 Cal. App., 67;

Lewis v. White, 16 Ohio St., 444;

Parsons on Contracts, p. 678 (9th Ed.).

In the case at bar Springe was in default in failing to furnish a merchantable title, while Brown's default arose solely from the fact that he failed to make the

final payment and insisted on remaining in possession nevertheless.

It follows that since both parties were in default either of them could rescind the contract at any time.

Glock v. Howard etc. Co., 123 Cal., 1, at p. 16.

Applying the principle of mutual defaults, Brown's conduct was in law a continuing offer to abandon and rescind. So also Springe's failure to make the title good was in law likewise a continuing offer on his part to abandon and rescind. Either could acquiesce in the offer of the other. Springe by electing to demand possession and sue in ejectment gave his consent to Brown's offer and from that moment the abandonment and rescission was complete.

Prentice v. Erskine, 164 Cal., 450;

Hicks v. Lowell, *supra*;

Gwin v. Calegaris, 139 Cal., 390-1.

(e) When a contract of purchase and sale is abandoned and rescinded by the mutual consent of the parties the law makes it the duty of each party to surrender to the other all that he has received under the contract.

California Civil Code, Sec. 1716;

Heilig v. Parlin, 134 Cal., 99, and cases cited.

The rule as to the right of a vendee upon abandonment or rescission of the contract to recover back

his payments, extends even to cases where the vendee alone is in default and the vendor is not in default at all, but is nevertheless, generous enough to give his assent by word or act to a rescission or abandonment.

Shively v. Semi-Tropic L. & W. Co., 99 Cal.,

259;

Glock v. Howard etc. Co., 123 Cal., 1.

If in assenting to such rescission, nothing is said by the parties on the subject of a return of money payments, the law implies an agreement that they shall be returned to the vendee.

Law Credit Co. v. Tibbitts, 160 Cal., 629.

(f) It was Brown's duty from the time that Springe demanded a surrender of the possession of the premises to yield up such possession to Springe; and it was Springe's duty to return to Brown the moneys received by Springe under the contract, together with a sum equal to the value of Brown's improvements, less the fair rental value of the use and occupation of the premises.

Garvey v. Lashells, 151 Cal., 531;

Haile v. Smith, 128 Cal., 419.

(g) The law, under the foregoing circumstances, favors the vendor only to this extent: He may sue in ejectment without first tendering back to the vendee the cash received and the value of the vendee's im-

provements; but the vendee is not permitted to recover his money payments and outlays until he has first surrendered possession voluntarily to the vendor, or until he has been evicted from the premises.

Haile v. Smith, supra, and cases cited;
Rhorer v. Bila, 83 Cal., 55.

(h) If the vendor sues in ejectment the vendee cannot defend the action upon the ground that the vendor's title is not good.

Gervaise v. Brookins, 156 Cal., 103.

(i) Nor will that fact together with the fact that he has made large payments and erected valuable improvements constitute a defense.

Gervaise v. Brookins, 156 Cal., 103;
Burnett v. Caldwell, 9 Wallace (U. S.), 293.

(j) Nor can the vendee file a cross-complaint and so recover in the ejectment suit his money payments and outlays.

Hoffman v. Remnant, 72 Cal., 1;
Glide v. Kayser, 142 Cal., 420.

(k) The law permits the vendor who is himself in default to recover from the vendee the value of the use and occupation from and after the time that he demands possession.

Hannan v. McNickle, 82 Cal., 127.

This relief, together with the recovery of possession, is the whole measure of the rights of a vendor who cannot or does not make his title good. Assuredly a vendor who is himself in default cannot forfeit the vendee's payments and outlays merely because the vendee does not surrender possession forthwith upon his demand.

The law does not favor forfeitures and it is enough if the vendee voluntarily surrenders possession at any time before he sues the vendor to recover the money he has paid on the contract.

And even if the vendee does not surrender possession voluntarily the result is the same; for it is enough that a vendee has been evicted from possession prior to suing to recover his payments and outlays.

Rhorer v. Bila, 83 Cal., 55.

All that the law requires is that the vendor is in fact back in possession, before vendee brings his suit.

The foregoing propositions are conclusive in the case at bar; for

(1) It appears that Brown surrendered possession while the action of ejectment was still pending (*California Code of Civil Procedure*, Sec. 1049), without moving for a new trial or taking an appeal. He did not require the vendor to take out a writ or call in the sheriff (Tr., p. 150). In fact, both parties seem to have acted very agreeably about the matter, and the actual surrender of possession at the last was by

agreement (Tr., p. 151). The surrender was therefore a voluntary one.

But even if the surrender, because made while the suit was pending, is to be treated as an eviction of Brown, he nevertheless could sue after such eviction to recover his payments and outlays.

Rhorer v. Bila, 83 Cal., 55.

(m) But for Brown's possession of the premises the case would be identical in principle with the recent case of *Allen v. Chatfield*, 172 Cal., 60. When the vendor tendered a deed, Allen, the vendee, shrugged his shoulders and said that he "didn't have the money to give the vendor." Allen sued to recover the \$5000 he had paid under the contract. The court held that Allen was entitled to recover the amount, saying of the vendor (p. 69): "Every principle of justice demands that he should return it." This was because the title of the vendor was not good.

There the possession had not passed to Allen, while here Brown was in possession.

But is there any reason for not holding here, just as was held in the case of *Allen v. Chatfield*, that every principle of right and justice demands that Springe should return this money?

At the worst, Springe—the man who had not made good the title and who was himself in default—had been out of possession for less than six months after his demand. Brown had made a total outlay of more

than \$50,000 on account of a piece of land for which he had agreed to pay but \$47,000. Why should he forfeit this amount to Springe when Springe's title was bad and the value of the use and occupation during the detention could readily be ascertained and Springe have credit for the full measure thereof?

(n) Not only does the general conception in cases of this character call for a restoration to the vendee of the purchase money, and the value of the improvements, but the hardships to which any other rule would lead is well illustrated by the facts in the case at bar; for

The Court knows judicially that the latter half of the year 1907 was one of financial panic. Money could not be obtained even upon "gilt edge" securities and by the last of October the entire country was on a clearing house certificate basis. For months the Governor of this State declared successive legal holidays, and the very day on which Springe last offered a deed to Brown was a legal holiday.

S. F. "Recorder," Vol. 14, Nos. 139-150;
Poheim v. Meyers, 98 Pac., 66.

To hold that Springe could purge himself of his own default by thus tendering a deed sufficient in form to convey his defective title to Brown, and to permit him to have back the land and to retain the \$50,000 in money and the improvements is shocking

to the conscience and would exalt an imaginary "rule of the game" at the expense of justice; for such a rule would mean that if the defaulting vendee hastens to restore possession before the defaulting vendor sues in ejectment, he may have back his payments and outlays; but that the vendor by sprinting to the Clerk's office and filing a suit before the vendee vacates the property, can forfeit those payments.

Even so-called "rules of the game" are not so absurd and unjust, and that is why we call it an "imaginary" rule.

(o) Counsel have devoted so much space to a discussion of the question of the date at which Brown was in default for failure to make the final payment under the contract that it might be thought to have some bearing upon the legal situation of the parties. But the date is utterly unimportant. The material thing is that both parties were in default at the date when Springe demanded possession and filed his ejectment suit. The defendant in error strenuously claims that Brown was bound to make the final payment on September 15th, 1907. We, on the other hand, think that the extension agreement of September 12, 1907 (Tr., p. 141), set the time for final payment at large. But be that as it may, the facts remain that Brown was in possession under the contract at the time when Springe tendered him a deed sufficient in form to convey whatever title Springe had, and that at the time of such tender Springe demanded the final pay-

ment, which Brown failed to make (Tr., p. 94). ~~But~~
In either event Brown, like Springe, was in default. Brown failed to make his payments under the contract, and still retained possession, and that is all that is necessary to the discussion.

(p) The vendee's election to have a specific performance of the contract did not operate as a waiver of his objections to the title.

The authorities render the retention by the defendant in error of these moneys, so inexcusable that his counsel are forced to desperate measures. They iterate and reiterate the assertion that the vendee, pursuant to the contract, had three options, if the title proved defective, viz.: to have specific performance *or* to extend Springe's time to cure the defects *or* to abandon the contract and take back his money (Brief, pp. 12, 13, 6).

In short, Springe's counsel are driven to the remarkable contention that the vendee was not given an election to require specific performance of the contract, which election should be coupled with an extension of Springe's time in which to remove the specific objections to the title. While undoubtedly there is an ellipsis in the paragraph of the contract which refers to the rights of the vendor should the title not be cured within the ninety days given by the contract (Tr., p. 12); yet obviously said ellipsis must be supplied by the word "and" and not by the word "or."

The ellipsis does not create an ambiguity, for there is no hard and fast rule either of interpretation or of

grammar which would compel the court to supply the word "*or*" rather than the word "*and*"; while on the other hand it appears on the face of the contract that the only word that could be supplied with due regard to good sense is the word "*and*." The vendee is entitled to elect to have a specific performance, not of a part, but of the whole contract. The contract required the vendor to furnish a merchantable title and to clear up the title if it is not merchantable, and to deliver a deed conveying good title concurrently with the final payment. It would therefore be absurd to say that the contract could be performed specifically if Springe was not prepared to furnish a merchantable title.

But even if there had been an ambiguity, the doubt has been resolved against Springe by the interpretation put upon the contract by the parties themselves, as the court will find by reading the letter of the vendee to Springe's attorney dated March 18, 1907 (Tr., p. 125), and also the letter of Springe's attorney in response thereto, dated April 16, 1907 (Tr., p. 128).

(q) In a further effort to stem the current of authority defendant in error urges that there was no rescission because there was no return or offer to return the personal property referred to in the contract. But it is obvious that the portion of the contract which concerns the personalty is entirely independent of and separable from the provisions for the sale of the realty. The contract is not entire. It expressly

declared that the \$8000 which was payable, and which in fact was paid on the 15th day of December, 1906, was the full purchase price of said personal property (Tr., p. 13). The mere fact that \$53,000 is recited in an earlier part of the contract as the total purchase price of the land and personalty is of no consequence whatever.

Field v. Austin, 131 Cal., 383.

But if it were otherwise—if the contract were so indivisible that it could not be rescinded by the act of one of the parties alone unless the rescission was *in toto*—this case would not be affected thereby; for a contract may always be abandoned or rescinded or altered or modified in part by the mutual consent of the parties.

California Civil Code, Secs. 1691, 1698.

And such mutual consent, as we have seen, need not be expressed, but it may be implied from the conduct of the parties.

Here the conduct of both the parties was such that the law imputes to them a mutual consent to let the contract stand so far as concerns the personalty, and to mutually abandon so much of the contract as related to the land.

It is only when a rescission is not affected by mutual acquiescence or consent that a restoration or offer to restore what has been received is essential.

California Civil Code, Sec. 1691.

(1) The rule permitting the forfeiture of partial payments in cases where the law permits it, is harsh enough, particularly where the payments and outlays of the vendee have been large.

Why should a court wish to make the situation one whit easier than it already is for greedy vendors?

Take the case at bar. When the entire country was in the throes of a financial panic and money had been superseded by clearing house certificates and loans were not obtainable even upon the highest class of securities, Springe, who had himself failed to live up to the contract, desired to obtain a forfeiture of the moneys already received by him and take back his lands as well. But the law exacted, before it would give him his pound of flesh, that he first cure his title and then tender a deed. If he had done this and then the vendee refused to pay, Springe could have retained both the land and the money. But he could not legally keep it otherwise. In short, if there is no performance by the vendor—if he is himself in default—the law will never permit him to claim a forfeiture of the vendee's payments. It will permit him to rescind, abandon and restore, but not to forfeit.

If instead of placing himself in a position to perform the contract, Springe saw fit to demand and recover the possession from the vendee by suit in ejectment the law stamps his conduct as a consent to the rescission and abandonment of the contract and de-

mands that he return the consideration which he has received, including the value of the improvements placed by the vendee on his lands. Is this not just? Is it not sound morality as well as sound law?

THE JUDGMENT IN EJECTMENT IS NOT A BAR TO THE RIGHT TO RECOVER BACK THE PURCHASE MONEY.

A few considerations should make this entirely clear.
First: both parties were in default:

(a) Springe's failure to comply with his contract consisted in this; that his title was not originally good nor had it been made good. Brown's default arose from the fact that he had not made the final payment but nevertheless remained in possession of the lands despite the fact that final payment had been demanded and a deed tendered sufficient in form to convey him such title as Springe had. While Springe, upon Brown's default, could treat the contract as abandoned and recover in ejectment, he could not have specific performance, nor could he sue Brown for breach of the contract. Brown, on the other hand, was estopped from showing in the ejectment suit that Springe was in default because Brown had received possession from Springe and therefore could not dispute his vendor's title.

Cases supra.

Brown, in other words, could neither plead Springe's want of title as a defense in the action of

ejectment nor could he by means of a cross-complaint setting forth Springe's want of title recover his payments and outlays under the contract. How then can a judgment in ejectment bar the right to recover on the claim?

Cases *supra*.

(b) The judgment does not mean that Springe had a good title, nor that he was not himself in default. Brown's position was identical with that of the defendant in *Haile v. Smith*, 128 Cal., 415, where the Supreme Court of California said of Smith:

"He received possession of the land from respondent under the contract, and can retain possession only by fulfilling his covenants which he therein made. He cannot keep both the land and the purchase money. It is not necessary, therefore, for the purpose of this case, to determine definitely whether or not respondent has a good and sufficient title. . . if he concluded not to comply because the title was not satisfactory to him, he was bound to restore possession to the respondent. **Whatever cause of action he may have for the purchase money which he paid and for the value of his improvements is another matter; it constitutes no defense to the present action.**"

(c) Not only does the foregoing decision indicate that the judgment in ejectment is no bar, but the same conclusion follows from the fact that Brown could have no cause of action until a surrender of the premises had been made to Springe. Had he asserted his claim before the possession was surrendered it would have been premature.

Cases supra.

Is it not absurd to suppose the judgment in ejectment is a bar to Brown's right to recover on a claim which he could not under any circumstances assert in an ejectment suit?

(d) We have seen that both upon authority and on principle the judgment in ejectment should not be held to be a bar to this particular action.

But our adversaries say that issues were tendered and findings made in the ejectment suit which cover the very matters involved in this litigation. We are unable to find any such issues or findings. There is no finding whatever that Springe had a merchantable record title to the property. Nor is there any finding that Springe was not in default. Without such issues the vital questions before the court in the case at bar would be wholly wanting. But even if there had been such issues tendered, and if they had been expressly found upon, even then they would not have been "actually *and* necessarily" included in the judgment or "necessary thereto," within the meaning of Section 1911 of the Code of Civil Procedure of California.

These matters were wholly immaterial; for upon the admissions in the answer itself, plaintiff was entitled to judgment for possession. The only facts and issues essential to uphold the judgment are: (1) that defendant is in possession under the contract to purchase which he pleads; (2) that the final payment is

past due; and (3) that the vendee has not made the final payment, but still holds possession.

These are the only facts essential to the judgment. Everything else that is alleged is unnecessary and immaterial. All other facts even if in issue and found upon would not estop Brown from litigating the same matter again.

The language of Section 1911 of the Code of Civil Procedure of California is but an embodiment of the general law on this precise point.

In a very able opinion dealing with the doctrine of *res adjudicata* the United States Circuit Court of Appeals for the Second Circuit, in *Langdon v. Clark*, 221 Fed. Reporter, 841, said, quoting from a New York case:

“The rule, with its qualifications, is very well stated in the brief of the learned counsel for the appellant in this action, as follows: “A judgment does not operate as an estoppel in a subsequent action between the parties as to immaterial or unessential facts, even though put in issue by the pleadings and directly decided. But it is final as to every fact litigated and decided therein, having such a relation to the issue that its determination was necessary to the determination of the issue.””

* * * *

And again:

“The plaintiffs in the first action asserted title to the whole lake, and it might be thought that the trial court was fully justified in entering the judgment which it did. But we must remember the principle laid down by the New York Court of Appeals in *House v. Lockwood*, *supra*, that a judgment does not operate as an estoppel as to imma-

terial or unessential facts even though put in issue by the pleadings and directly decided."

* * * *

"To render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined—that is, **that the verdict in the suit could not have been rendered without deciding that matter**; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter.'"

It follows that in the case at bar the judgment in ejectment was not an estoppel; and that the trial court was therefore in error in granting a nonsuit.

Respectfully submitted.

CHARLES S. WHEELER and
JOHN F. BOWIE,
Attorneys for Plaintiff in Error.

No. 2956

IN THE

United States Circuit Court of Appeals 9

For the Ninth Circuit

POWER AND IRRIGATION COMPANY OF CLEAR
LAKE (a corporation),

Plaintiff in Error,

VS.

HEINZ SPRINGE,

Defendant in Error.

REPLY TO SYLLABUS OF POINTS OF LAW MADE IN
THE ORAL ARGUMENT OF CHARLES S. WHEELER.

LUTHER ELKINS,

RICHARD P. HENSHALL,

Attorneys for Defendant in Error.

FILED
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REPLY TO SYLLABUS OF POINTS OF LAW MADE IN THE ORAL ARGUMENT OF CHARLES S. WHEELER.

DEFENDANT IN ERROR ENTITLED TO RETAIN MONEYS PAID TO HIM UNDER THE CONTRACT.

1. Plaintiff in error in this case seeks to recover from defendant in error certain moneys paid by his assignor, J. Dalzel Brown, on the purchase price of certain lands under a contract for the sale and purchase of real estate. *Brown admittedly failed to pay the final installment of the purchase price under the contract.* The contract provides:

“But if the sale herein provided for is not consummated under the terms and conditions of the agreement by reason of the failure of the purchaser to pay the balance of the

purchase price when due as herein provided, then the sums of money paid by the seller on account of the purchase price and interest thereon shall be forfeited and retained by the seller as liquidated damages, and the seller shall be thereafter released from all further obligation in law and equity to convey said lands, and may at once take possession thereof and re-rent the same." (Tr. pp. 12-13.)

Therefore, not only under the law but *by the express terms of the contract* the vendor, Springe, *the defendant in error* in this case, *was entitled to retain the purchase money paid by Brown on the contract.*

In *Skookum Oil Company v. Thomas*, the Court says:

"It seems to us that the principles so clearly presented in *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, (69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713), are determinative of the questions here involved. It is was there held that under a contract for the sale of real estate, in which time is made of the essence of the contract and performance by the vendee is made a condition precedent to a conveyance and upon breach thereof he is declared to forfeit all rights thereunder, *including payments made thereon*, the vendee cannot, after his default, without excuse shown therefor, by a tender of the amount due, acquire either an equitable or a legal right to maintain an action to recover back the moneys paid under the contract, nor can the purchaser, in such case, put the vendor in default by mere tender; nor can he elect to consider the contract at an end, and recover what he has paid on the contract, when the vendor has not abandoned the contract, but stands upon its terms and conditions. It was

also held that under such a contract, the refusal of the vendor to accept a tender made by a purchaser after such default, does not effect a rescission of the contract, nor entitle the vendee to recover the money paid. Neither will equity relieve such purchaser who has made an unexcused default and has not fulfilled conditions precedent to the vesting of his right of action. It was held further that the vendor's right to retain the purchase money, where default was unexcused, is independent of any express clauses in the contract for forfeiture of rights, or for the retention of the purchase money as liquidated damages, and that such express clauses are but declarations in express terms of the legal rights of the parties under such a contract, existing without them."

Skookum Oil Co. v. Thomas, 162 Cal. 544,
approving *Glock v. Howard*, 123 Cal. 1.

2. Plaintiff in error attempts to avoid *the force of law and the terms of the contract* as above expressed by setting up the ingenious *if not convincing* contention as follows: (a) The vendee was in default because he failed to make the final payment under the contract upon tender of deed; (b) the vendor was in default because he was unable to convey a good title; (c) both vender and vendee being in default, either could elect to treat the contract as rescinded and recover from the other whatever he had given to the other in part performance. (Plaintiff in Error's Syllabus of Points etc. pp. 1, 2 and 3.)

3. Unfortunately for plaintiff in error's contention, his whole argument is based upon two *supposed*

facts—*neither of which exist*. These *supposed* facts are:

- (A) Default of Springe; the vendor under the contract;
 - (B) An *implied* mutual rescission of the contract.
-

(A) SPRINGE NOT IN DEFAULT.

4. The question as to whether or not Springe, the vendor under the contract, could or could not furnish the vendee a good title cannot be considered in this case for two reasons, viz:

(1) The vendee *elected* to demand a deed and take such title as the vendor had, or was able to give, and to hold him liable in *damages* for any loss suffered by reason of a defective title; and—

(2) The vendee is *estopped* by his acts—and by the judgment in the action in ejectment—from claiming the vendor did not have or was not able to furnish a good title.

Brown's assignor, Shuman, notified Springe:

“* * * I elect to insist upon the specific performance of Mr. Springe's agreement to sell.” (Tr. p. 126.)

“* * * I hereby give notice that I will hold Mr. Heinz Springe liable for all *damages* suffered or occasioned by reason of his refusal to remove the said specified defects.” (Tr. p. 127.)

(3) Springe did tender a good title. (Tr. pp. 94-95.)

Brown having entered into possession of the real property under the contract refused to surrender possession, though requested so to do, after tender of a deed by Springe and demand by Springe for the payment of the balance of the purchase price. (Tr. p. 95.) Springe thereafter brought an action in ejectment for the possession of the real property. (Tr. pp. 146, 160.) In that action Brown in his answer set up his right of possession under the contract, litigated the case on that theory, and judgment was rendered against him—not on the theory of an *implied mutual* rescission of the contract—but on the theory that Springe *was not* in default under the contract; that Brown *was* in default under the contract; and that Brown (and his assignee) *had forfeited all their rights under the contract*. (Tr. pp. 91-100-150.)

Had Brown on tender of the deed to him by Springe, paid the balance of the purchase price he *then* could have brought suit against Springe for any damage he might have suffered by reason of any defects in Springe's title.

In *Gates v. McLean*, the Court says:

“* * * In the latter case it is considered that he is willing to receive such title as the vendor is able to give and he is content with the personal responsibility of the vendor upon his conveyance.”

Gates v. McLean, 70 Cal. 42, approved in *Worley v. Nethercot*, 191 Cal. 517.

But Brown failed to make payment or to tender payment on tender of the deed to him by Springe, so the question of defects in Springe's title from that time on was and is *wholly out of the case*.

In *Gervaise v. Brookins*, the Court said:

"These doctrines dispose of the case. Brookins is estopped from denying the title of Book while he retains the possession which he obtained from Book in pursuance of the contract of sale. Hence, he cannot set up the want of title as an excuse for non-performance on his part. The proffered defense to the action for possession, founded on the failure and inability of the vendor's successor in interest to comply with Brookin's demand for a good title, must be disregarded, because of the fact that he received his possession from Book, from whose successor he would now withhold it. *His retention of the possession thus received binds him to pay the price and accept the vendor's title, such as it is.*" (The italics are ours.)

Gervaise v. Brookins, 156 Cal. 108.

In *Rhorer v. Bila*, 83 Cal. 54, (23 Pac. 275), upon similar facts the Court says:

"A purchaser cannot remain in possession of lands under a contract and at the same time refuse to pay the purchase price. * * * So long as the purchaser retains possession he waives all previous objections, whether of defect of title or delay in completing it; and is bound to accept title according to the terms of the contract if offered while he still retains possession." In *Gates v. McLean*, 70 Cal. 50, (11 Pac. 492, 493), the court says: 'Even where the contract provides for the vendee taking possession, the remedy of the purchaser, where the title of the vendor fails, or

he is unable to make conveyance as stipulated in the contract, is to rescind the contract, or offer to, and to restore the possession, in which case he may recover the purchase money advanced and the interest, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably have been worth. If, on the other hand, the purchaser chooses not to rescind, but to retain possession under the contract, he can do so only on the condition that he pays the purchase money and interest according to the contract. *In the latter case, it is considered that he is willing to receive such title as the vendor is able to give.*' This doctrine is also approved in *Garvey v. Lashells*, 151 Cal. 531, (91 Pac. 498); *Keller v. Lewis*, 53 Cal. 118; *Haynes v. White*, 55 Cal. 41; *Central P. Co. v. Mudd*, 59 Cal. 590; *Whittier v. Stege*, 61 Cal. 241; *Hannan v. McNickle*, 82 Cal. 126, (23 Pac. 271); *Worley v. Nethercott*, 91 Cal. 517, (25 Am. St. Rep. 209, 27 Pac. 767); *Hill v. Den*, 121 Cal. 46, (53 Pac. 642); *Haile v. Smith*, 128 Cal. 419, (60 Pac. 1032.)"

Approved in *Gervaise v. Brookins*, 156 Cal. 107-108.

Neither does the contention by plaintiff in error that the provision that "time was of the essence of the contract" was waived by the vendor in any sense aid him for, if true, the only effect of such waiver was to require a tender of the deed as a prerequisite to putting the vendee in default—and such tender of deed was admittedly made.

In *Hayt v. Bentel*, the Court says:

"* * * reliance is placed upon *Glock v. Howard etc. Co.*, 123 Cal. 1, (69 Am. St. Rep.

17, 43 L. R. A. 199, 55 Pac. 713). In the opinion in that case, the status of a defaulting purchaser under a contract for the sale of real estate is fully discussed, and the rule declared that such a purchaser, who has, without excuse, failed to make payment of installments as they fell due, *cannot, by a belated tender, put the seller in default and thus establish a right to recover the sums paid under the contract.* But this undoubtedly sound doctrine does not apply to a case where the vendor has waived the delay in making payments. * * * These facts bring the case precisely within the principle declared in *Boone v. Templeman*, 158 Cal. 290, (139 Am. St. Rep. 126, 110 Pac. 947). There the court declared the rule to be that where the vendor, under an agreement like the one before us, permits the entire contract price to become due, without exercising his option to declare a forfeiture, 'the payment of the price then become a dependent and concurrent condition, non-payment alone does not put the vendee in default, *the vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture, or maintain a suit either for the whole price, or for an intermediate installment.*' "

Hayt v. Bentel, 164 Cal. 684.

Brown, the vendee, having made default in the payment of the final installment of the purchase price upon tender of the deed by Springe, Springe had the right under the law—and also by express terms in the contract—to *retain the installment payments paid by Brown* and to bring suit to eject

Brown from the real property as Brown had failed to surrender it on demand made.

Glock v. Howard, 123 Cal. 1;

Skookum Oil Company v. Thomas, 162 Cal. 544.

**(B) NO RESCISSION OF THE CONTRACT—ACTUAL
OR IMPLIED.**

5. The sole remaining contention of plaintiff in error is that because Brown, within a few days after judgment rendered against him in the ejectment suit, surrendered the possession of the real property to the defendant in error, pursuant to the judgment, then, forsooth, the contract must be deemed rescinded by mutual consent of the vendor and vendee—and that, therefore, the vendee can recover the moneys paid by him on the contract.

Such a claim, we submit, merits no consideration.

In *Odd Fellows' Savings Bank v. Brander*, 124 Cal. 258, the Courts say:

“It is well settled that ‘a party who has advanced money, or done an act, in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done.’ (*Hansbrough v. Peck*, 5 Wall. 497; *Ketchum v. Everston*, 13 Johns. 359; 7 Am. Dec. 384; *Keller v. Lewis*, supra.) This is true whether or not the contract provides for a forfeiture of payments made in case of the

vendee's failure to complete the purchase. (*Glock v. Howard etc. Co.*, 123 Cal. 1.) The present case is a striking illustration of the wisdom and justice lying at the root of this rule. Brander and his assigns have been in possession of this land since the purchase, presumably receiving its rents and profits, and have not only failed to make the payments due on the principal debt, but have defaulted in payment of rent and taxes to an amount greater than the payments made on the price. The contention of defendants has no merit. The law will not permit defendants to profit pecuniarily by their own default."

Odd Fellows' Savings Bank v. Brander, 124 Cal. 258.

See, also,

Orsler v. Thacher, 152 Cal. 739.

A party in default cannot rescind—without the consent of the other party; and Brown, assignor of plaintiff in error, was in default—and was so adjudged in the action in ejectment—prior to the surrender by him of the possession of the real property pursuant to the judgment. There is not one particle of evidence—nor is there any presumption—that Springe, the vendor, consented to a rescission of the contract. Such consent exists alone in the brain of counsel for plaintiff in error.

The urging of such contention, as was well said in *Bingham v. Kearney*, 136 Cal. p. 177, we submit, is merely trifling with the Court.

Further, as it is stated in our Civil Code:

“he must rescind promptly upon discovering the facts which entitle him to rescind.” (The italics are ours.)

California Civil Code, Section 1691.

See

Cross v. Mayo, 167 Cal. 604-605.

When Brown went to trial in the action in ejectment, wherein he set up his rights under the contract, he then, if not before, abandoned and lost forever any right he at any time may have had to rescind the contract.

As was said in *Cross v. Mayo*:

“While the point is not available on the appeal from the order denying a new trial, there is no force in defendant’s claim that he is, in any event, entitled to a return of the payments already made by him under the contract. The authorities relied on by him state the rule in cases where there is a rescission, or abandonment by consent. There was no rescission or abandonment by consent in this case, defendant’s claim for a rescission being denied by the judgment. Plaintiff has not attempted to rescind, but has always insisted on the contract and is standing on its terms. His right to retain the purchase price already paid, including the property deeded to him in part payment thereof, is fully sustained by many decisions in this state. (See *Glock v. Howard etc. Co.*, 123 Cal. 1, (69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713); *Odd Fellows’ Savings Bank v. Brander*, 124 Cal. 255, (56 Pac. 1109); *Oursler v. Thacher*, 152 Cal. 739, (93 Pac. 1007).)”

Cross v. Mayo, 167 Cal. 606.

ESTOPPEL BY JUDGMENT.

6. J. Dalzel Brown, the assignor of plaintiff in error, had his day in Court.

In the action in ejectment Brown, the assignor of plaintiff in error, had the undoubted right to set up—and he did set up—all his legal and equitable defenses to Springe's action in ejectment.

In *Doherty v. Courtney* (which was an action in ejectment) the Court, by Sloss, J., says:

“Under our system of procedure, where legal and equitable remedies are administered in the same tribunal and there are no special forms of action, a defendant may set up by way of equitable defense, any matter which would, if presented by him as the basis of an original bill in equity, have entitled him to a judgment for the relief sought by his answer. The rule has repeatedly been applied in actions of the character of the present one. In *Willis v. Wozencraft*, 22 Cal. 607, this Court said: ‘A mere equitable title to land, if it is of such a character as entitles the holder to possession in equity, is a sufficient defense under our system of practice to an action for the possession, brought even by the holder of the legal title.’ ”

Doherty v. Courtney, 150 Cal. 608.

While Springe, in the action in ejectment, did not in terms ask that the contract be declared in force or that the payments made thereunder be forfeited, both questions were necessarily raised and involved in the action when Brown, by his answer therein, set up the contract and alleged his right to the possession and of purchase of the real property there-

under; and the Court's judgment foreclosed Brown's rights under the contract.

In *Bingham v. Kearney* the Court says:

“The former action was between the same parties. It involved the same subject matter—the contract concerning the sale of the land. The court in the former action had declared the contract valid, and that the defendant had the right to have it foreclosed and to be restored to the possession of the land. The present action is brought for the purpose of having the same contract rescinded and to recover the payments made thereunder. The Court which in the former action declared the contract valid and the payments made thereunder forfeited, is asked in this action to declare the contract void, and that plaintiff may recover the payments made thereunder. It is the rule, long recognized in this country, that a judgment between the same parties is conclusive, not only as to subject matters in controversy in the action upon which it is based, but also in all other actions involving the same question, and upon all matters involved in the issues which might have been litigated and decided in the case, the presumption being that all such issues were met and decided. It is not the policy of the law to allow a new and different suit between the same parties, concerning the same subject matter, that has already been litigated; neither will the law allow the parties to trifle with the courts by piecemeal litigation. When plaintiff was brought into court by defendant in the former case, she certainly knew her rights. If she wished to rescind the contract, or if she had rescinded it, as she said in her answer she had done, then and there was the time to present her pleadings and evidence and insist upon all rights to which she was entitled under the law. If she could not

get the award of the law upon the facts in the lower court, she could have appealed. She did not do so. She is now met by the presumption that all the facts and matters in controversy were disposed of in the former suit, and the further presumption that the judgment in the former suit is correct. If she failed to assert her claim properly, or to present the proper evidence in the first suit, she will not now be permitted in a second to litigate it. The principles herein stated are elementary. They are stated in the late case of *Quick v. Rooney*, 130 Cal. 510."

Bingham v. Kearney, 136 Cal. p. 177.

Brown, appeared in the action in ejectment, set up a number of defenses, and was defeated. Among the defenses thus set up was one that involved a specific performance of the contract. (Tr. pp. 80-5.) Another defense was that he had made an assignment over to a third person who was in possession of the premises under him and in this regard the vendee further alleged that that person had brought suit against him and the vendor claiming specific performance of the contract and tendering the money. (Id.) These allegations, of course, were all found against him (see p. 91 et seq.) when judgment was rendered for the vendor; but, in addition, they constituted complete, absolute and specific waivers of any alleged defects in the title and they were the antithesis of the alleged rescission relied upon in this case.

We need not repeat what was said on the oral argument on this point, nor recopy the allegations

referred to, but we may refer to pages 30 to 40 of our brief and to pages 60 to 99 of the record where, we think, the Court will be astonished at the record facts on this point.

On March 18, 1907, the vendee formally notified the vendor in writing that he elected to insist upon the specific performance by the vendor of his agreement to sell. This election is found on pages 126 to 127 of the transcript and is referred to by us on page 6 of our brief. Such an election forever terminated the right of the vendee to do anything except to pay the money and to require the vendor to execute and deliver a deed. It was a waiver of all defects in the title, and, without regard even to the judgment, ought to dispose finally of the plaintiff in error's case.

In California the judgment roll consists of the pleadings, the findings, and the judgment (C. C. P. § 670) and the judgment, of course, must be read in the light of the findings and the pleadings. (*Illinois P. & J. Bk. v. Pac. Ry. Co.*, 115 Cal. 297.) The findings in the action of ejectment are in the record and they find practically everything against the vendee. (Tr. p. 91.) They not alone find everything in favor of the vendor which was essential to the case, and without which judgment could not have been rendered in his favor, so as to enable him to maintain ejectment, but, in addition, they find against the vendee specifically on every claim which he had voluntarily set up in his answer in that case. (See pp. 91 et seq.) The judgment entered upon

these findings, of course, is conclusive upon all of these questions and as said by the judge of the Court below, where a party undertakes in a court of justice to set up a defense which we may assume he need not even have set up, but judgment goes against him, he is concluded forever from asserting that defense in another case.

Bingham v. Kearney, 136 Cal. 177.

As pointed out by us at the oral argument, it is a rule of law that a judgment is an estoppel in a subsequent suit upon the same cause of action, not alone upon every matter which was litigated in the former action but upon every matter which might possibly have been litigated in that action. Where the cause of action in the subsequent case is different, however, the rule is subject to the modification that the judgment is an estoppel as to those matters which were actually litigated in that action or such matters as were so necessarily involved therein that the judgment could not have been rendered without deciding them. (*Cromwell v. County of Sac.*, 94 U. S. 351.) In this case we are within both principles because, as we have pointed out, the judgment for the plaintiff in an ejectment suit could not have been rendered without establishing that the vendee was in default; while, on the other hand, the judgment in this case not alone established that fact but, by reason of the specified assertion by the vendee of a number of defenses which he set up in that action, concluded the vendee from asserting in any other Court any of these defenses.

The fact that an appeal was not taken by the vendee from the judgment in the ejectment suit is not material. He was not bound to appeal. Nor is the fact, that after the judgment ousting him from possession was rendered, he surrendered possession of the premises a rescission of the contract. The surrender was not voluntary but was under the process of the Court just as much so as if he had been put out physically by the sheriff. The contract was no longer there to rescind because it had become *merged in the judgment* which was based upon it.

NO OFFER TO RESCIND EVER MADE.

7. A further, although a minor reason why we think this action cannot be maintained was advanced at the oral argument and to which we make a brief reference. The contract of sale between the parties fixed the purchase price at \$50,000, and it related to both real and personal property. The contract provided for four installment payments, of which all were paid except the last. Of the first payment it was agreed that \$8000 should be regarded as applicable to the purchase price of the personal property. *The complaint seeks to recover the full amount paid, including the amount paid on account of the personal property.* Plaintiff in error does not offer to restore the personal property or to credit its value.

A rescission can not be effected unless the party restores or offers to restore everything of

value which he has received under the contract rescinded. There is no allegation in the complaint and no proof that prior to the commencement of this action the plaintiff ever tendered to the defendant the personal property referred to, or ever offered to credit him with its value. *There* is no proof that the original *status quo* was ever sought to be reinstated. If a rescission of this contract in part,—which in effect is what the plaintiff seeks to bring about in this case,—is permissible, we have this singular result:

(a) The contract is rescinded in part and is executed in part; for that portion of the agreement relating to the personal property is not alone treated as valid but it is regarded as executed and sustained.

(b) Such rescission is a direct violation of the plain language of the Civil Code, Section 1691, subdivision 2, which provides how a rescission shall take place:

C. C., Sec. 1691. “RESCISSION, how effected. Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and,

2. He must restore to the other party everything of value which he has received from

him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so."

(c) It is very plain that this separation of the contract for the purposes of rescission can not take place without making a new contract for the parties. Thus *non constat* the original contract for the realty might never have been entered into had not the clause with respect to the personalty been agreed to. If, therefore, one of the parties desires to rescind the contract with respect to the realty, he should also rescind it with respect to the personal property.

(d) The closing paragraph of this agreement shows that it was intended by the seller to sell, and by the purchaser to buy *all the real property and property rights* of every kind owned by the seller and situated in the County of Lake, State of California, with the exception of certain specified property; and it was specially agreed that if there were any other properties belonging to the seller, they should be deemed to have passed to the purchaser under the agreement.

The purchaser, therefore, can not now treat this contract as rescinded without rescinding it *in toto*, and must, as a condition precedent to the maintenance of his action, allege that he has restored,

or has offered to restore, everything that he got under the contract, real or personal property.

Civ. Code, Sec. 1691;

Southern Pacific R. R. Co. v. Choate, 132 Cal. 280;

McCracken v. City of San Francisco, 16 Cal. 638;

Laffey v. Kaufman, 134 Cal. 391.

The above considerations, we think, are fatal to plaintiff in error's case; and it is submitted that the judgment should be affirmed.

Dated, San Francisco,

January 21, 1918.

Respectfully submitted,

LUTHER ELKINS,

RICHARD P. HENSHALL,

Attorneys for Defendant in Error.

*gld.
JEB.*

